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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

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No. 82.

THE SOUTHERN PINE LUMBER COMPANY, T. L. L. TEMPLE, G. W. R. CHINN, ET AL., PLAINTIFFS IN ERROR AND APPELLANTS,

vs.

W. B. WARD ET AL.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED AUGUST 10, 1908.

(20,330.)

(20,330.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 365.

THE SOUTHERN PINE LUMBER COMPANY, T. L. L. TEMPLE, G. W. R. CHINN, ET AL., PLAINTIFFS IN ERROR AND APPELLANTS,

vs.

W. B. WARD ET AL.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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a No. 1483.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation, ET AL., Plaintiffs in Error,

vs.

W. B. WARD ET AL., Defendants in Error.

Appeal from the Supreme Court of Oklahoma Territory to the Supreme Court of the United States.

b In the Supreme Court of the United States.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation; T. L. L. TEMPLE, G. W. R. CHINN, and MRS. G. W. R. CHINN, Plaintiffs in Error,

vs.

W. B. WARD; THE SOUTHERN PINE LUMBER COMPANY, a Partnership Composed of T. L. L. Temple and Benjamin Whittaker; G. M. D. GRIGSBY and D. J. GRIGSBY, Partners as Grigsby Brothers; J. W. MCNEAL, CHARLES GRISWOLD, J. D. DE BOIS, HATTIE P. DE BOIS, J. D. ELDER, WILLIAM H. DUGAN, ANNA BANNISTER, E. L. BLINCOE, and THE AMERICAN EXCHANGE BANK, a Corporation, Defendants in Error.

Citation.

UNITED STATES OF AMERICA, *Territory of Oklahoma, ss:*

The President of the United States to W. B. Ward; The Southern Pine Lumber Company, a partnership composed of T. L. L. Temple and Benjamin Whittaker, and each of them; G. M. D. Grigsby and D. J. Grigsby, partners as Grigsby Brothers, and each of the them; J. W. McNeal, Charles Griswold, J. D. De Bois, Hattie P. De Bois, J. D. Elder, William H. Dugan, Anna Bannister, E. L. Blincoe, and The American Exchange Bank, a corporation, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States of America, to be holden at the City of Washington, within thirty days from this date, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the Territory of Oklahoma, wherein The Southern Pine Lumber Company, a corporation, T. L. L. Temple, G. W. R. Chinn and Mrs. G. W. R. Chinn are plaintiffs in error, and you are defendants in error, to show cause if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error prayed, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 12th day of June, in the

year of our Lord one thousand nine hundred and six, and of the Independence of the United States of America the one hundred and thirty-first.

[Seal Supreme Court, Territory of Oklahoma.]

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest:
BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

[Endorsed:] 1483. Citation.

c I, George W. Buckner, attorney for W. B. Ward, defendant in error, in said cause, do hereby accept and acknowledge the due personal service of the foregoing citation therein, this 15th day of June, 1906, and enter his voluntary appearance therein.

GEO. W. BUCKNER,
Attorney for said Defendant in Error.

Filed Jul- 7, 1906.

BENJ. F. HEGLER,
Clerk Supreme Court,
By —— ——, *Deputy*

d I hereby, on this 15th day of June, A. D. 1906, accept and acknowledge due personal service of this citation on behalf of G. M. D. Grigsby and D. J. Grigsby, late partners as Grigsby Brothers, and each of them as individuals, the defendants in error above named, and enter their voluntary appearance in said cause.

F. H. PRENDERGAST,
Attorney for said Defendants in Error in said Cause.

Filed Jul- 7, 1906.

BENJ. F. HEGLER,
Clerk Supreme Court,
By —— ——, *Deputy.*

e The undersigned defendant in error in said cause hereby accepts and acknowledges the due personal service of this citation, this 15th day of June, 1906, and enters a voluntary appearance therein.

AMERICAN EXCHANGE BANK,
By WALKER HILL, *President.*

Attest:
G. M. TRUMBO,
Acting Cashier.

Filed Jul- 7, 1906.

BENJ. F. HEGLER,
Clerk Supreme Court,
By —— ——, *Deputy.*

f The undersigned defendants in error, the late partnership of The *The* Southern Pine Lumber Company, composed of T. L. L. Temple and Benjamin Whittaker, hereby accept and acknowledge the due personal service of the foregoing citation, and enter a voluntary appearance in said cause, this 17th day of June, 1906.

THE SOUTHERN PINE LUMBER COMPANY,
By BENJ. WHITAKER,
A Partner Thereof.

Filed Jul- 7, 1906.

BENJ. F. HEGLER,
Clerk Supreme Court,
By —— ——, *Deputy.*

g The undersigned defendants in error, and each of them, acknowledge and accept the due personal service of the foregoing citation in said cause, this 15th day of June, 1906, and enter their voluntary appearance therein.

E. L. BLINCOE,
Defendant in Error.
H. P. DE BOIS,
JOHN D. DE BOIS,
Defendants in Error.
J. W. McNEAL,
Defendant in Error.
CHARLES GRISWOLD,
Defendant in Error.

Filed Jul- 7, 1906.

BENJ. F. HEGLER,
Clerk Supreme Court,
By —— ——, *Deputy.*

h [Endorsed:] No. 1483. Southern Pine Lumber Company, a Corporation, *et al.*, Plaintiffs in Error, *vs.* W. B. Ward *et al.*, Defendants in Error. Citation and Proof Service Thereof. Filed Jul- 7, 1906. Benj. F. Hegler, Clerk Supreme Court, By —— ——, Deputy.

1 And afterwards on the Twelfth day of June, 1906, there was filed in said cause a Petition for Writ of error, Assignments of Error and Affidavits as to amount in controversy, which Petition for Writ of Error, Assignments of Error and Affidavits read in words and figures as follows, to wit:

2 In the Supreme Court of the Territory of Oklahoma.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation; T. L. L. TEMPLE, G. W. R. CHINN, and MRS. G. W. R. CHINN, Plaintiffs in Error,

vs.

W. B. WARD; THE SOUTHERN PINE LUMBER COMPANY, a Partnership Composed of T. L. Temple and Benjamin Whittaker; G. M. D. GRIGSBY and D. J. GRIGSBY, Partners as Grigsby Brothers; J. W. MCNEAL, CHARLES GRISWOLD, J. D. DE BOIS, HATTIE P. DE BOIS, J. D. ELDER, WILLIAM H. DUGAN, ANNA BANNISTER, E. L. BLINCOE, and THE AMERICAN EXCHANGE BANK, a Corporation, Defendants in Error.

Petition for Writ of Error.

To the Honorable Supreme Court of the Territory of Oklahoma:

The above named plaintiffs in error, conceiving themselves aggrieved by the judgment of the Supreme Court of said Territory, rendered on the 7th day of September, 1905, affirming the judgment of the District Court of Logan County, in the Territory of Oklahoma, in rendering and entering a certain judgment for the defendants in error, W. B. Ward, and the orders therein for the recovery by him against the defendants in error, G. M. D. Grigsby and D. J. Grigsby, of the sum of Five Thousand One Hundred Dollars ($5,100.00), as principal, with twelve per cent. per annum from date as interest, and One Hundred and Seventy Dollars ($170.00) as accrued interest, and the further sum of Five Hundred and Twenty Dollars ($520.00), as attorneys' fees, and costs of suit, and declaring said sums a lien on the certain real estate hereinafter described, and foreclosing the trust deed of the said W. B. Ward thereon, and ordering the sale of said real estate for the payment of said judgment and barring these plaintiffs in error and the other parties to this action from all lien upon, or right, title, interest or estate and from the equity of redemption of said property or any part thereof, and awarding and granting other relief pertinent thereto; and conceiving themselves further aggrieved by the judgment of the said Supreme Court
3 entered on the same date first above mentioned, affirming the judgment of the District Court of Logan County, Oklahoma Territory of the same date as first above named judgment in said District Court, in rendering and entering a certain judgment for the defendants in error, G. M. D. Grigsby and D. J. Grigsby, that they are the owners in fee simple title to the said real estate and that their title thereto be quieted in them, subject to the lien of the said W. B. Ward, and barring all of the other persons and parties to the said action therein, any right, title or interest therein or thereto and barring them from setting up or asserting the same and holding and adjudging the certain former suit and proceeding, #1524 of the American Exchange Bank against The Southern Pine Lumber Company, and others, and the attachment proceeding and sale therein.

and the purchase of said real estate at said sale, to be null and void and setting aside and vacating the same, and of granting and ordering other relief pertaining thereto, said judgment fixing and declaring the said demands of the said W. B. Ward, defendant in error, as a first lien on the said real estate; and the said plaintiffs in error, conceiving themselves further aggrieved by the order and judgment of the said Supreme Court denying and refusing the motion of the above named plaintiffs in error for a rehearing in and of said cause in said Supreme Court of date January 11, 1906, and further aggrieved by the overruling of the motions of these plaintiffs in error, in the said trial court for new trials in said cause, and by the rendering of judgments for the said defendants in error, W. B. Ward and G. M. D. Grigsby and D. J. Grigsby, instead of for these plaintiffs in error, and by refusing to reverse the judgments of the trial court because of the admission of incompetent, irrelevant and immaterial evidence upon the trial of said cause, and by excluding competent, relevant and material evidence offered by these plaintiffs in error, in the trial of said cause, and by making the findings in said cause
4 against these plaintiffs in error, W. B. Ward, G. M. D. Grigsby and D. J. Grigsby, and by not rendering judgment in said cause for the plaintiffs in error on the evidence introduced on the trial of said cause, and by rendering judgment against these plaintiffs in error, and in favor of the said defendants in error, W. B. Ward, G. M. D. Grigsby and D. J. Grigsby, as above set forth, said real estate being described as follows, to wit:

An undivided (4-5) four-fifths interest in and to lots number (17) seventeen, (18) eighteen, (19) nineteen, (20) Twenty and (21) twenty-one, in block number (60) sixty, in Oklahoma City in the County of Oklahoma, in the Territory of Oklahoma, also an undivided (4-5) four-fifths interest in and to an undivided (5-10) five-tenths of (½) one-half interest in and to lots number (4) four, (5) five, (6) six, (7) seven, and (21) twenty-one in block number (43) forty-three in the City of Guthrie, Logan County, Oklahoma Territory, commonly known as Guthrie Proper, also an undivided (4-5) four-fifths interest in and to lot number (9) nine in block number (54) fifty-four, in that subdivision of the City of Guthrie, Logan County, Oklahoma Territory, commonly known as Guthrie Proper; also an undivided (4-5) four-fifths interest in and to an undivided (½) one-half interest in lots number (11) eleven, and (12) twelve in block number (43) forty-three, in that subdivision of the city of Guthrie, Logan County, Oklahoma Territory, known as East Guthrie, also an undivided (4-5) four-fifths interest in and to an undivided (½) one-half interest in lot number (15) fifteen in block number (51) fifty-one, on Harrison Ave., in that subdivision of the City of Guthrie, Logan County, Oklahoma Territory, commonly known as East Guthrie, according to the recorded plat thereof, on file with the respective registers of deeds of the counties of Logan and Oklahoma, and in the Territory of Oklahoma, do hereby prosecute proceedings in error from said orders, judgments and decrees of the Supreme Court of the Territory of Oklahoma to the Supreme
5 Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith and made a part

thereof, and they pray that a writ of error may be allowed, and that a transcript of the record, proceedings and papers upon which said *judgment of affirmance was made, duly authenticated by the* Clerk of this Court, may be sent to the Supreme Court of the United States, and that the Court may fix the supersedeas bond of the said plaintiffs in error and appellants, to be given within a reasonable time, and enter the necessary orders herein, allowing and affecting proceeds upon appeal and in error, and that the said judgment of the Supreme Court of the Territory of Oklahoma be reversed and the judgment and decree be made, remanding said cause for the further proceedings in error in the Supreme Court of the Territory of Oklahoma, and in the trial Court and for a new trial therein, and that such further decree may be made as to said Honorable Court may seem legal, just and proper.

J. D. COOK,
JOHN H. COTTERAL,
C. G. HORNOR,
Attorneys for Plaintiffs in Error.

Endorsed: No. 1483. Southern Pine Lumber Company *et al.*, Plaintiffs in Error, *vs.* W. B. Ward *et al.*, Defendants in Error. Petition for Writ of Error. Filed June 12, 1906. Benj. F. Hegler, Clerk Supreme Court.

6 In the Supreme Court of the Territory of Oklahoma.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation; T. L. L. TEMPLE, G. W. R. CHINN, and MRS. G. W. R. CHINN, Plaintiffs in Error,

vs.

W. B. WARD; THE SOUTHERN PINE LUMBER COMPANY, a Partnership Composed of T. L. L. Temple and Benjamin Whittaker; G. M. D. GRIGSBY and D. J. GRIGSBY, Partners as Grigsby Brothers; J. W. McNEAL, CHARLES GRISWOLD, J. D. DE BOIS, HATTIE P. DE BOIS, J. D. ELDER, WILLIAM H. DUGAN, ANNA BANNISTER, E. L. BLINCOE, and THE AMERICAN EXCHANGE BANK, a Corporation, Defendants in Error.

Assignment of Errors.

The Southern Pine Lumber Company, a corporation, T. L. L. Temple, G. W. R. Chinn, and Mrs. G. W. R. Chinn, the above named plaintiffs in error, hereby assign errors in the judgment of the Supreme Court of the Territory of Oklahoma in the above entitled cause, dated the 7th day of September, A. D. 1905, in the following particulars:

First. Because said Court erred in the ruling and decision made by it awarding W. B. Ward judgment on the note and trust deed sued upon by him, and affirming the judgment of the trial court to the same effect, including foreclosure and sale of the real property involved and described in said trust deed, whereas, as shown by the

record and proofs, said note and trust deed were never acquired or owned by him but were fully paid and satisfied by G. M. D. Grigsby and D. J. Grigsby before said W. B. Ward, defendant in error, ever had or made any claim thereto.

Second. Because said Court erred in the ruling and decision made by it, awarding the said real property involved to G. M. D. Grigsby and D. J. Grigsby, defendants in error, and quieting their title thereto, subject to the trust deed of the said W. B. Ward, for that the original plaintiff, W. B. Ward, never had any demand to sue upon, but nevertheless sued upon a non-existing claim, in collusion
7 with and for the benefit of the said G. M. D. Grigsby and D. J. Grigsby, who, by virtue of this action, had no right thereby as defendants to litigate in equity for that property or to obtain equitable relief pertaining thereto, against their co-defendants, these complainants in error.

Third. Because said Court erred in holding and adjudging that the title to the real property in dispute be awarded to, and quieted in the defendants in error, G. M. D. Grigsby and D. J. Grigsby, for that the action of the original plaintiff below, W. B. Ward, now defendant in error, was groundless and based upon a non-existing claim, and should have been dismissed, and the said G. M. D. Grigsby and D. J. Grigsby, should thereupon have been relegated to an independent action, for they had nor held any claims worthy of adjudication in court.

Fourth. Because said Court erred in quieting the title to the property involved in G. M. D. Grigsby and D. J. Grigsby, and awarding to them the title thereto in this action for that the adverse title to said property which they assail in this action, was acquired by these complainants at a sheriff's sale under attachment in a former action, number 1524, wherein The American Exchange Bank, a corporation, is plaintiff and the said G. M. D. Grigsby and D. J. Grigsby are defendants, and the said plaintiff Bank in said former action was never made a party to this present action.

Fifth. Because said Court erred in decreeing the title to said real property in said G. M. D. Grigsby and D. J. Grigsby, defendants in error and appellees, in this action, for that there is a missing party to this action, namely, The Southern Pine Lumber Company, a corporation under the laws of Texas, which bought said property at the said attachment sale thereof, and it was never sued or made a party to this action, but is a necessary and indispensable party hereto.

Sixth. Because the said Court erred in decreeing the title to said real property in G. M. D. Grigsby and D. J. Grigsby, defendants in error and appellees, whereas they wholly failed to prove any
8 ownership in or title to said property in them, or either of them, at any time.

Seventh. Because said Court erred in decreeing the title to said real property in G. M. D. Grigsby and D. J. Grigsby, defendants in error, in this action, for that the claim made by them for said property was and is by virtue only of a collateral attack upon the said former action, number 1524, in which they were defendants, and the at-

tachment proceedings and sale of their interest in said property, therein, *supra*, and by virtue of the impeachment of the said former suit, proceedings and sale and not by a direct, but by an indirect attack, and they should have been relegated to a direct proceeding and a direct attack, and their cross-petition, praying that said property be awarded to them and their title quieted therein, should have been in all things, for such causes, dismissed.

Eighth. Because the said Court erred in decreeing the title to said real property in G. M. D. Grigsby and D. J. Grigsby, defendants in error, for that said decree awards them title thereto in equity against their co-defendants, these complainants, whereas, said defendants in error have always had, and still have, and should have been limited to, a plain and adequate remedy at law given them, to wit, a remedy under the laws of the Territory of Oklahoma, to have said former action, judgment, proceedings and sale vacated and set aside, whether void or voidable, as provided by sections 4454-4472, Statutes of Oklahoma, 1893, also found in sections 4760-4768, Revised and Annotated Statutes of Oklahoma, 1903, (Wilson).

Ninth. Because said Supreme Court erred in holding and finding the said judgments and orders of said District Court be affirmed and in affirming the same.

Tenth. Because the said Supreme Court erred in not reversing said judgments and orders of said District Court, and in not dismissing the action of said W. B. Ward and in not dismissing the cross-
9 petition of said G. M. D. Grigsby and D. J. Grigsby, and in not awarding all costs to these plaintiffs in error and appellants.

Eleventh. Because said Supreme Court erred in denying the motion of the appellees for a rehearing in and of said cause.

Wherefore, the complainants in error pray that the judgment of the Supreme Court of the Territory of Oklahoma herein may be reversed, annulled and held for naught, and that they may be restored to all things which they have lost by occasion and on account of said judgment and that the errors of the Supreme Court of the Territory of Oklahoma may be fully corrected, and that judgment be rendered dismissing the cause of action of said defendant in error, W. B. Ward, and the cross petition of G. M. D. Grigsby and D. J. Grigsby, defendants in error, and that costs be awarded these complainants in error.

J. D. COOK,
COTTERAL & HORNOR,
Attorneys for Plaintiffs in Error.

[Endorsed:] 1483. Southern Pine Lumber Company *et al.*, Plaintiffs in Error, *vs.* W. B. Ward *et al.*, Defendants in Error. Assignments of Error. Filed Jun- 12, 1906. Benj. F. Hegler, Clerk Supreme Court, by —— ——, Deputy.

10 In the Supreme Court of the Territory of Oklahoma.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation, ET AL., Plaintiffs in Error,

vs.

W. B. WARD ET AL., Defendants in Error.

Affidavit.

TERRITORY OF OKLAHOMA, *Logan County, ss:*

John H. Cotteral, of lawful age, being first duly sworn upon oath deposes and says:

That he is one of the attorneys of said above named plaintiffs in error, and makes this affidavit in their behalf; that he has resided in the city of Guthrie, in Logan County, Oklahoma Territory, for more than seventeen years; that he well knows what the controversies in the above entitled cause have been and now are; that the amount of the recovery of the said defendant in error, W. B. Ward, plaintiff in the trial court in said cause, was of the date of his judgment in said trial court, to wit, March 16, 1903, and at the date the same was affirmed by the Supreme Court of the Territory of Oklahoma, more than the sum of Five Thousand Dollars ($5,000.00), exclusive of interest since the date of said original judgment, and exclusive of all costs; that said judgment and recovery was for money; and that no part of the same has been paid or remitted.

Affiant further says, that he knows the value of the real property involved in the said action, the title to which was by said judgment of said trial court and by the judgment affirming the same by said Supreme Court quieted in the defendants in error, G. M. D. Grigsby and D. J. Grigsby, both at the time of the rendition of said judgment in their favor, on March 16, 1903, and at the date of the affirmance thereof by said Supreme Court, on September 7th,
11 1905; and that at both and each of said dates, and at this time, the said value of said real property so involved in this cause, was, and it still is worth more than Five Thousand Dollars ($5,000.00), exclusive of interest and costs.

That therefore the amount in controversy in this action, both as to recovery of said defendant in error, W. B. Ward, and the award of said real property to the said G. M. D. Grigsby and D. J. Grigsby, at the date of the judgment of the said district court and at the date of the affirmance thereof by the Supreme Court of said Oklahoma Territory, exceeded and still exceeds the sum of Five Thousand Dollars ($5,000.00).

JOHN H. COTTERAL.

Subscribed and sworn to before me this 12th day of June, 1906.

[SEAL.] BENJ. F. HEGLER,
Clerk of the Supreme Court of Oklahoma Territory.

Endorsed: Southern Pine Lumber Company *et al.*, Plaintiffs in Error, *vs.* W. B. Ward *et al.*, Defendant- in Error. Affidavit as to Amount in Controversy. Filed June 12, 1906. Benj. F. Hegler, Clerk Supreme Court.

12 In the Supreme Court of the United States.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation, ET AL., Plaintiffs in Error,

vs.

W. B. WARD ET AL., Defendants in Error.

Affidavit.

TERRITORY OF OKLAHOMA, *County of Logan, ss:*

T. F. McKennon, of lawful age, being first duly sworn, deposes and says:

That he is a resident of the City of Guthrie, Logan County, Oklahoma Territory, and knows what the controversy in the above entitled cause is; that the cause of the action of the said W. B. Ward, plaintiff below, and his judgment therein as rendered by the district court of Logan County, Oklahoma Territory, and affirmed by the Supreme Court of said Territory, are for the recovery of money as well as the foreclosure of a trust deed, and that his said judgment, when the same was rendered in said district court on the 16th day of March, 1903, was for the sum of Five Thousand, Seven Hundred and Ninety-seven Dollars ($5797.00), and that the said judgment amounted, when the judgment and decision in this cause was rendered and entered by the Supreme Court of the Territory of Oklahoma on September 7, 1905, to more than said sum and to more than Five Thousand Dollars ($5,000.00); that the amount involved in this controversy therefore, exceeds Five Thousand Dollars, exclusive of costs and interest, and that no part of said judgment has been paid or remitted.

Affiant further says that he has resided continuously in the City of Guthrie, Logan County, Oklahoma Territory, for more than ten (10) years last past, and during said time has been and still
13 is familiar with the values of real estate therein, including the dates of the judgments in said action both in said district court and in said Supreme Court, and he further says, that he is also familiar with and knows well the real estate involved in this action, both in the City of Guthrie and in the City of Oklahoma City, and knows the aggregate value thereof, and states that the said value of the said real estate exceeded Five Thousand Dollars on the dates, March 16, 1903, and September 7, 1905, and at this time and at all times since March 16, 1903, and that the amount involved in this controversy therefore exceeds Five Thousand Dollars, exclusive of costs and interest.

Affiant further says, that he makes this affidavit in behalf and for the benefit of the said complainants.

T. F. McKENNON.

Subscribed and sworn to before me this 12th day of June, A. D. 1906.

My Commission Expires 2/26/08.

R. C. BURNSDALE,
Notary Public.

[SEAL.]

Endorsed: 1493. Southern Pine Lumber Company *et al.*, Plaintiffs in Error, *vs.* W. B. Ward *et al.*, Defendants in Error. Affidavit as to Amount in Controversy. Filed June 12, 1906. Benj. F. Hegler, Clerk Supreme Court.

14 And afterwards on the same day, June 12, 1906, there was filed in said cause an Order allowing a Writ of Error, which Order reads in words and figures as follows, to wit:

15 In the Supreme Court of the Territory of Oklahoma.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation, ET AL.,
Plaintiffs in Error,
vs.
W. B. WARD ET AL., Defendants in Error.

Order.

Now on this the 12th day of June, A. D. 1906, come the plaintiffs in error, The Southern Pine Lumber Company, a corporation, and T. L. L. Temple, and G. W. R. Chinn and Mrs. G. W. R. Chinn, by their attorneys, John H. Cotteral and C. G. Hornor, and file herein and present to the Court their petition, praying for the allowance of writ of error, intended to be urged by said plaintiffs in error, and also filed herewith its assignment of errors, and praying also that a transcript of the record and proceedings and papers, upon which the judgment herein was rendered, and the judgment and decree herein, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises; on consideration whereof, the Court does allow the writ of error and direct and command the clerk of this court to certify and transmit to the Supreme Court of the United States, a true and certified transcript of the records, and all papers, files and proceedings herein.

It is further ordered that the plaintiffs in error shall give bond in the sum of Three Thousand Dollars ($3,000.00) to be approved by the Clerk of this Court, within twenty-five days from this date, and upon so doing, these proceedings in error and said bond shall operate as a supersedeas and stay of all proceedings herein in the Supreme Court of the Territory of Oklahoma, and in the District Court of Logan County, Oklahoma Territory, pending said cause in
16 the Supreme Court of the United States.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest:

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

[SEAL.]

Endorsed: 1483. The Southern Pine Lumber Co. *et al.*, Appellants, *vs.* W. B. Ward *et al.*, Appellees. Order. Filed Jun- 12, 1906. Benj. F. Hegler, Clerk Supreme Court.

17 And thereafter one the same day, June 12, 1906, there was *was* issued in said cause a Writ of Error, which Writ of Error reads in words and figures as follows, to wit:

18 In the Supreme Court of the United States.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation; T. L. L. TEMPLE, G. W. R. CHINN, and MRS. G. W. R. CHINN, Plaintiffs in Error,

vs.

W. B. WARD; THE SOUTHERN PINE LUMBER COMPANY, a Partnership Composed of T. L. L. Temple and Benjamin Whittaker; G. M. D. GRIGSBY and D. J. GRIGSBY, Partners as Grigsby Brothers; J. W. MCNEAL, CHARLES GRISWOLD, J. D. DE BOIS, HATTIE P. DE BOIS, J. D. ELDER, WILLIAM H. DUGAN, ANNA BANNISTER, E. L. BLINCOE, and THE AMERICAN EXCHANGE BANK, a Corporation, Defendants in Error.

Writ of Error.

UNITED STATES OF AMERICA, *Territory of Oklahoma, ss:*

The President of the United States of America to the Honorable Judges and Clerk of the Supreme Court of the Territory of Oklahoma, Greeting:

Because in the record of proceedings, as also in the rendition of the judgment of a plea, which is in the said Supreme Court of the Territory of Oklahoma, before you, being the highest court of law or equity of the said Territory, in which a decision could be had, in the said suit between the said The Southern Pine Lumber Company, a corporation, T. L. L. Temple, G. W. R. Chinn and Mrs. G. W. R. Chinn, plaintiffs in error, and W. B. Ward, The Southern Pine Lumber Company, a partnership, composed of T. L. L. Temple and Benjamin Whittaker, G. M. D. Grigsby and D. J. Grigsby, partners as Grigsby Brothers and each of them, J. W. McNeal, Charles Griswold, J. D. De Bois, Hattie P. De Bois, J. D. Elder, William H. Dugan, Anna Bannister, E. L. Blincoe, and The American Exchange Bank, a corporation, defendants in error, wherein a judgment was rendered in favor of the said W. B. Ward against said G. M. D. Grigsby and D. J. Grigsby, for the recovery of money upon a promissory note and for the foreclosure of a trust deed and other pertinent relief, and wherein a further judgment was rendered in favor of said G. M. D. Grigsby and D. J. Grigsby, quieting the title to certain real estate involved as against all parties to said action, and subject to the judgment of the said W. B. Ward, which was declared a lien on said real estate, together — other pertinent relief, and wherein certain other orders were made and entered, and affirm-

ing the judgment of the lower court, at the cost of the plaintiffs in error, and wherein the amount in controversy exceeds more
19 than Five Thousand Dollars, exclusive of interest and costs, that is to say, the recovery of the said W. B. Ward exceeds said sum, and the value of the said real estate awarded to the said G. M. D. Grigsby and D. J. Grigsby, exceeds said sum of Five Thousand Dollars, both of said judgments and each of said judgments exceeding said sum in the lower court and in the Supreme Court, without any part thereof being paid or remitted, as is fully shown by the affidavits of competent witnesses, and wherein it appears that a manifest error hath happened to the great damage of the said plaintiffs in error, as by their complaint and assignment of errors appears, we being willing that error, if any hath been, should be fully and duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, at the said Supreme Court, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 12th day of June, in the year of our Lord, one thousand nine hundred and six, in the year of the Independence of the United States of America the one hundred and thirty-first.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

The foregoing writ is allowed:

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

[Endorsed:] 1483. Southern Pine Lumber Company *et al.*, Plaintiffs in Error, *vs.* W. B. Ward *et al.*, Defendants in Error. Writ of Error. Filed Jun- 12, 1906. Benj. F. Hegler, Clerk Supreme Court, by —— ——, Deputy.

19*a* In the Supreme Court of the United States.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation; T. L. L. TEMPLE, G. W. R. CHINN, and MRS. G. W. R. CHINN, Appellants,

vs.

W. B. WARD; THE SOUTHERN PINE LUMBER COMPANY, a Partnership Composed of T. L. L. Temple and Benjamin Whittaker; G. M. D. GRIGSBY and D. J. GRIGSBY, Partners as Grigsby Brothers; J. W. MCNEAL, CHARLES GRISWOLD, J. D. DE BOIS, HATTIE P. DE BOIS, J. D. ELDER, WILLIAM H. DUGAN, ANNA BANNISTER, E. L. BLINCOE, and THE AMERICAN EXCHANGE BANK, a Corporation, Appellees.

Citation.

UNITED STATES OF AMERICA, *Territory of Oklahoma, ss:*

The President of the United States to W. B. Ward, The Southern Pine Lumber Company, a partnership composed of T. L. L. Temple and Benjamin Whittaker, G. M. D. Grigsby and D. J. Grigsby, partners as Grigsby Brothers and each of them, J. W. McNeal, Charles Griswold, J. D. De Bois, Hattie P. De Bois, J. D. Elder, William H. Dugan, Anna Bannister, E. L. Blincoe, and The American Exchange Bank, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States of America, to be holden at City of Washington, within thirty days from this date next, pursuant to an appeal filed in the office of the Clerk of the Supreme Court of the Territory of Oklahoma, wherein The Southern Pine Lumber Company, a corporation, T. L. L. Temple, G. W. R. Chinn and Mrs. G. W. R. Chinn are appellants and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellants, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 12th day of June, in the year of our Lord, one thousand nine hundred and six, and of the Independence of the United States of America, the one hundred and thirty-first.

[Seal Supreme Court, Territory of Oklahoma.]

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest:
BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

[Endorsed:] 1483. Citation.

19*b* I, George W. Buckner, attorney for W. B. Ward, appellee, in said cause, do hereby accept and acknowledge the due personal service of the foregoing citation therein, this 15th day of June, 1906, and enter his voluntary appearance therein.

GEO. W. BUCKNER,
Attorney for said Appellee.

Filed Jul- 7, 1906.

BENJ. F. HEGLER,
Clerk Supreme Court,
By —— ——, *Deputy.*

19*c* I hereby, on this 15th day of June, A. D. 1906, accept and acknowledge due personal service of this citation on behalf of G. M. D. Grigsby and D. J. Grigsby, late partners as Grigsby Brothers, and each of them as individuals, the appellees above named, and enter their voluntary appearance in said cause.

F. H. PRENDERGAST,
Attorney for said Appellees in said Cause.

Filed Jul- 7, 1906.

BENJ. F. HEGLER,
Clerk Supreme Court,
By —— ——, *Deputy.*

19*d* The undersigned appellee in said cause hereby accepts and acknowledges the due personal service of this citation and enters a voluntary appearance therein this 15th day of June, 1906.

AMERICAN EXCHANGE BANK,
By WALKER HILL, *President.*

Attest:
G. M. TRUMBO,
Acting Cashier.

Filed Jul- 7, 1906.

BENJ. F. HEGLER,
Clerk Supreme Court,
By —— ——, *Deputy.*

19*e* The undersigned appellees in the said cause, and each of them, do hereby accept and acknowledge the due personal service of the foregoing citation, this 15th day of June, A. D. 1906, and enter their voluntary appearance therein.

H. P. DE BOIS,
JOHN D. DE BOIS, *Appellees.*

Filed Jul- 7, 1906.

BENJ. F. HEGLER,
Clerk Supreme Court,
By —— ——, *Deputy.*

19*f* The undersigned appellees, the late partnership of The Southern Pine Lumber Company, composed of T. L. L. Temple and Benjamin Whittaker, hereby accept and acknowledge the due personal service of the foregoing citation, and enter a voluntary appearance in said cause, this 17th day of June, 1906.

THE SOUTHERN PINE LUMBER COMPANY,
By BENJ. WHITAKER, *A Partner.*

Filed Jul- 7, 1906.

BENJ. F. HEGLER,
Clerk Supreme Court,
By —— ——, *Deputy.*

19*g* The undersigned appellees, and each of them, acknowledge and accept the due personal service of the foregoing citation in said cause, this 15th day of June, 1906, and enter their voluntary appearance therein.

E. L. BLINCOE, *Appellee.*
J. W. McNEAL, *Appellee.*
CHARLES GRISWOLD, *Appellee.*

Filed Jul- 7, 1906.

BENJ. F. HEGLER,
Clerk Supreme Court,
By —— ——, *Deputy.*

[Endorsed:] No. 1483. The Southern Pine Lumber Company, a Corporation, *et al.*, Appellants, *vs.* W. B. Ward *et al.*, Appellees. Citation and Proof Service Thereof. Filed Jul- 7, 1906. Benj. F. Hegler, Clerk Supreme Court, by —— ——, Deputy.

20 And afterward on the 12th day of June, 1906, there was filed in said cause a Petition for Appeal, Assignment of Errors and Affidavits as to amount in controversy, which Petition, Assignment of Errors and Affidavits read in words and figures as follows, to wit:

21 In the Supreme Court of the Territory of Oklahoma.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation; T. L. L. TEMPLE, G. W. R. CHINN, and MRS. G. W. R. CHINN, Appellants,

vs.

W. B. WARD; THE SOUTHERN PINE LUMBER COMPANY, a Partnership Composed of T. L. L. Temple and Benjamin Whittaker; G. M. D. GRIGSBY and D. J. GRIGSBY, Partners as Grigsby Brothers; J. W. MCNEAL, CHARLES GRISWOLD, J. D. DE BOIS, HATTIE P. DE BOIS, J. D. ELDER, WILLIAM H. DUGAN, ANNA BANNISTER, E. L. BLINCOE, and THE AMERICAN EXCHANGE BANK, a Corporation, Appellees.

Petition for Appeal.

To the Honorable Supreme Court of the Territory of Oklahoma:

The above named appellants, conceiving themselves aggrieved by the judgment of the Supreme Court of said Territory, rendered on the 7th day of September, 1905, affirming the judgment of the District Court of Logan County, in the Territory of Oklahoma, in rendering and entering a certain judgment for the defendants in error and appellee, W. B. Ward, and the orders therein for the recovery by him against the appellees G. M. D. Grigsby and D. J. Grigsby, of the sum of Five Thousand One Hundred Dollars ($5,100.00), as principal, with twelve per cent. per annum from date as interest, and One Hundred and Seventy Dollars ($170.00) as accrued interest, and the further sum of Five Hundred and Twenty Dollars ($520.00), as attorneys' fees, and costs of suit, and declaring said sums a lien on the certain real estate hereinafter described, and foreclosing the trust deed of the said W. B. Ward thereon, and ordering the sale of said real estate for the payment of said judgment and barring these plaintiffs in error and appellants and the other parties to this action from all lien upon, or right, title, interest or estate and from the equity of redemption of said property or any part thereof, and awarding and granting other relief pertinent thereto; and conceiving themselves further ag-

22 grieved by the judgment of the said Supreme Court entered on the same date first above mentioned, affirming the judgment of the District Court of Logan County, Oklahoma Territory, of the same date as the first above named judgment in said District Court, in rendering and entering a certain judgment for the appellees, G. M. D. Grigsby and D. J. Grigsby, that they are the owners in fee simple title of the said real estate and that their title thereto be quieted in them, subject to the lien of the said W. B. Ward, and barring all of the other persons and parties to the said action therein, from any right, title or interest therein or thereto and barring them from setting up or asserting the same and holding and adjudging the certain former suit and proceeding, number 1524, of The America- Exchange Bank against The Southern Pine Lumber Company, and others, and the attachment proceedings and sale

therein, and the purchase of said real estate at said sale, to be null and void and setting aside and vacating the same, and of granting and ordering other relief pertaining thereto, said judgment fixing and declaring the said demands of the said W. B. Ward, appellee, as a first lien on the said real estate; and the said appellants, conceiving themselves further aggrieved by the order and judgment of the said Supreme Court denying and refusing the motion of the above named appellants for a re-hearing in and of said cause in said Supreme Court of date January 11, 1906, and further aggrieved by the overruling of the motions of these appellants in the said trial court for new trials in said cause, and by the rendering of judgments for the said appellees, W. B. Ward and G. M. D. Grigsby and D. J. Grigsby, instead of for these appellants, and by refusing to reverse the judgments of the trial court because of the admission of incompetent, irrelevant and immaterial evidence upon the trial of said cause, and by excluding competent, relevant and material evidence offered by these plaintiffs in error and appellants in the trial of said cause, and by mak-
23 ing the findings in said cause against these appellants, W. B. Ward, G. M. D. Grigsby and D. J. Grigsby, and by not rendering judgment in said cause for the appellants on the evidence introduced on the trial of said cause, and by rendering judgment against these appellants, and in favor of the said appellees, W. B. Ward, G. M. D. Grigsby and D. J. Grigsby, as above set forth, said real estate being described as follows, to wit:

An undivided (4/5) four-fifths interest in and to lots number (17) Seventeen, (18) eighteen, (19) nineteen, (20) Twenty and (21) twenty-one, in block number (60) sixty, in Oklahoma City in the County of Oklahoma, in the Territory of Oklahoma, also an undivided (4/5) four-fifths interest in and to an undivided (5/10) five-tenths of (1/2) one-half interest in and to lots number (4) four, (5) five, (6) six, (7) seven, and (21) twenty-one in block number (43) forty-three in the City of Guthrie, Logan County, Oklahoma Territory, commonly known as Guthrie Proper, also an undivided (4/5) four-fifths interest in and to lot number (9) nine in block number (54) fifty-four, in that subdivision of the City of Guthrie, Logan County, Oklahoma Territory, commonly known as Guthrie Proper; also an undivided (4/5) four-fifths interest in and to an undivided (1/2) one-half interest in lots number (11) eleven, and (12) twelve in block number (43) forty-three, in that subdivision of the city of Guthrie, Logan County, Oklahoma Territory, known as East Guthrie, also an undivided (4/5) four-fifths interest in and to an undivided (1/2) one-half interest in lot number (15) fifteen in block number (51) fifty-one, on Harrison Ave., in that subdivision of the City of Guthrie, Logan County, Oklahoma Territory, commonly known as East Guthrie, according to the recorded plat thereof, on file with the respective registers of deeds of the counties of Logan and Oklahoma, and in the Territory, of Oklahoma, do hereby prosecute proceedings upon appeal from said orders, judgments and decrees of the Supreme Court of the Territory of Oklahoma to
24 the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith

made a part thereof, and they pray that an appeal and writ of error may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment of affirmance was made, duly authenticated by the Clerk of this Court, may be sent to the Supreme Court of the United States, and that the Court may fix the supersedeas bond of the said plaintiffs in error and appellants, to be given within a reasonable time, and enter the necessary orders herein, allowing and effecting proceedings upon appeal and in error, and that the said judgment of the Supreme Court of the Territory of Oklahoma be reversed and the judgment and decree be made, remanding said cause for the further proceedings upon appeal and in error in the Supreme Court of the Territory of Oklahoma, and in the trial Court, and for a new trial therein, and that such further decree may be made as to said Honorable Court may seem legal, just and proper.

J. D. COOK,
COTTERAL & HORNER,
Attorneys for Plaintiffs in Error and Appellants.

Endorsed:—1483—The Southern Pine Lumber Company *et al.*, *vs.* W. B. Ward, *et al.*—Petition for Appeal.—Filed June 12, 1906, Benj. F. Hegler, Clerk Supreme Court.

25 In the Supreme Court of the Territory of Oklahoma.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation; T. L. L. TEMPLE, G. W. R. CHINN, and Mrs. G. W. R. CHINN, Appellants,

vs.

W. B. WARD; THE SOUTHERN PINE LUMBER COMPANY, a Partnership Composed of T. L. L. Temple and Benjamin Whittaker; G. M. D. GRIGSBY and D. J. GRIGSBY, Partners as Grigsby Brothers; J. W. MCNEAL, CHARLES GRISWOLD, J. D. DE BOIS, TATTIE P. DE BOIS, J. D. ELDER, WILLIAM H. DUGAN, ANNA BANNISTER, E. L. BLINCOE, and THE AMERICAN EXCHANGE BANK, a Corporation, Appellees.

Assignments of Error on Appeal.

The Southern Pine Lumber Company, a corporation, T. L. L. Temple, G. W. R. Chinn, and Mrs. G. W. R. Chinn, the above named appellants, hereby assign errors in the judgment of the Supreme Court of the Territory of Oklahoma in the above entitled cause, dated the 7th day of September, A. D. 1905, in the following particulars:

First. Because said Court erred in the ruling and decision made by it awarding W. B. Ward judgment on the note and trust deed sued upon by him, and affirming the judgment of the trial court to the same effect, including foreclosure and sale of the real property involved and described in said trust deed, whereas, as shown by the record and proofs, said note and trust deed were never acquired

or owned by him but were fully paid and satisfied by G. M. D. Grigsby and D. J. Grigsby before said W. B. Ward, appellee and defendant in error, ever had or made any claim thereto.

Second. Because said Court erred in the ruling and decision made by it, awarding the said real property involved to G. M. D. Grigsby and D. J. Grigsby, appellees, and quieting their title thereto, subject to the trust deed of the said W. B. Ward, for that the original plaintiff, W. B. Ward, never had any demand to sue upon,
26 but nevertheless sued upon a non-existing claim, in collusion with and for the benefit of the said G. M. D. Grigsby and D. J. Grigsby, who, by virtue of this action, had no right thereby as defendants to litigate in equity for that property or to obtain equitable relief pertaining thereto against their co-defendants, these complainants and appellants.

Third. Because said Court erred in holding and adjudging that the title to the real property in dispute be awarded to, and quieted in the appellees, G. M. D. Grigsby and D. J. Grigsby, for that the action of the original plaintiff below, W. B. Ward, now appellee, was groundless and based upon a non-existing claim, and should have been dismissed, and the said G. M. D. Grigsby and D. J. Grigsby, should thereupon have been relegated to an independent action, if they had or held any claims worthy of adjudication in court.

Fourth. Because said Court erred in quieting the title to the property involved in G. M. D. Grigsby and D. J. Grigsby, and awarding to them the title thereto in this action, for that the adverse title to said property which they assail in this action, was acquired by these complainants and appellants at a sheriff's sale under attachment in a former action, number 1524, wherein The American Exchange Bank, a corporation, is plaintiff and the said G. M. D. Grigsby and D. J. Grigsby are defendants, and the said plaintiff Bank in said former action was never made a party to this present action.

Fifth. Because said Court erred in decreeing the title to said real property in said G. M. D. Grigsby and D. J. Grigsby, appellees, in this action, for that there is a missing party to this action, namely, The Southern Pine Lumber Company, a corporation under the laws of Texas, which bought said property at the said attachment sale thereof, and it was never sued or made a party to this action, but is a necessary and indispensable party hereto.

Sixth. Because the said Court erred in decreeing the title to said real property in G. M. D. Grigsby and D. J. Grigsby, ap-
27 pellees, whereas they wholly failed to prove any ownership in or title to said property in them, or either of them, at any time.

Seventh. Because said Court erred in decreeing the title to said real property in G. M. D. Grigsby and D. J. Grigsby, appellees, in this action, for that the claim made by them for said property was and is by virtue only of a collateral attack upon the said former action, number 1524, in which they were defendants, and the attachment proceedings and sale of their interest in said property,

therein, *supra*, and by virtue of the impeachment of the said former suit, proceedings and sale, and not by a direct, but by an indirect, attack, and they should have been relegated to a direct proceeding and a direct attack, and their cross-petition, praying that said property be awarded to them and their title quieted therein, should have been in all things, for such causes, dismissed.

Eighth. Because the said Court erred in decreeing the title to said real property in G. M. D. Grigsby and D. J. Grigsby, appellees, for that said decree awards them title thereto in equity against their co-defendants, these complainants and appellants, whereas, said appellees have always had, and still have, and should have been limited to, a plain and adequate remedy at law given them, to wit, a remedy under the laws of the Territory of Oklahoma, to have said former action, judgment, proceedings and sale vacated and set aside, whether void or voidable, as provided by sections 4464-4472, Statutes of Oklahoma, 1893, also found in sections 4760-4768, Revised and Annotated Statutes of Oklahoma, 1903, (Wilson).

Ninth. Because said Supreme Court erred in holding and finding that the said judgments and orders of said District Court be affirmed and in affirming the same.

Tenth. Because said Supreme Court erred in not reversing said judgments and orders of said District Court, and in not dismissing the action of said W. B. Ward and in not dismissing the cross-
28 petition of said G. M. D. Grigsby and D. J. Grigsby, and in not awarding all costs to these plaintiffs in error and appellants.

Eleventh. Because said Supreme Court erred in denying the motion of these appellants for a rehearing in and of said cause.

Wherefore, the appellants, pray that the judgment of the Supreme Court of the Territory of Oklahoma herein may be reversed, annulled and held — naught, and that they may be restored to all things which they have lost by occasion and on account of said judgment, and that the errors of the Supreme Court of the Territory of Oklahoma may be fully corrected, and that judgment be rendered dismissing the cause of action of said appellee, W. B. Ward, and the cross petition of G. M. D. Grigsby and D. J. Grigsby, appellees, and that costs be awarded these appellees.

J. D. COOK,
COTTERAL & HORNOR,
Attorneys for Appellants.

[Endorsed:] 1483. Southern Pine Lumber Co. *vs.* W. B. Ward *et al.* Assignments of Error on Appeal. Filed Jun- 12 1906. Benj. F. Hegler, Clerk Supreme Court. By —— ——, Deputy.

29 In the Supreme Court of the United States.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation, ET AL., Plaintiffs in Error and Appellants,
vs.
W. B. WARD ET AL., Defendants in Error and Appellees.

Affidavit.

TERRITORY OF OKLAHOMA, *Logan County, ss:*

John H. Cotteral, of lawful age, being first duly sworn upon oath deposes and says:

That he is one of the attorneys of said above named complainants and appellants, and makes this affidavit in their behalf; that he has resided in the City of Guthrie, in Logan County, Oklahoma Territory, for more than seventeen years; that he well knows what the controversies in the above entitled cause have been and now are; that the amount of the recovery of the said appellee, W. B. Ward, plaintiff in the trial court in said cause, was of the date of his judgment in said trial court, to wit, March 16, 1903, and at the date the same was affirmed by the Supreme Court of the Territory of Oklahoma, more than the sum of Five Thousand Dollars ($5000.) exclusive of interest since the date of said original judgment, and exclusive of all costs; that said judgment and recovery was for money; and that no part of the same has been paid or remitted.

Affiant further says, that he knows the value of the real property involved in the said action, the title to which was by said judgment of said trial court and by the judgment affirming the same by said Supreme Court quieted in the appellees, G. M. D. Grigsby and D. J. Grigsby, both at the time of the rendition of said judgment in their favor, on March 16, 1903, and at the date of the affirmance thereof by said Supreme Court, on September 7th, 1905; and that at
30 both and each of said dates, and at this time, the said value of said real property so involved in this cause, was, and it still is more than Five Thousand Dollars ($5,000.00), exclusive of interest and costs.

That therefore the amount in controversy in this action, both as to recovery of said appellee W. B. Ward, and the award of said real property to the said G. M. D. Grigsby and D. J. Grigsby, at the date of the judgment of the said district court and at the date of the affirmance thereof of the Supreme Court of said Oklahoma Territory, exceeded and still exceeds the sum of Five Thousand Dollars ($5,000.00).

JOHN H. COTTERAL.

Subscribed and sworn to before me this 12th day of June, 1906.

BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

Endorsed:—1483—Southern Pine Lumber Co., *et al.* Plaintiffs in error *vs.* W. B. Ward, *et al.*, defendants in error Affidavit—Filed June 12, 1906, Benj. F. Hegler, Clerk Supreme Court.

31 In the Supreme Court of the United States.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation, ET AL., Plaintiffs in Error and Appellants,

vs.

W. B. WARD ET AL., Defendants in Error and Appellees.

Affidavit.

TERRITORY OF OKLAHOMA, *County of Logan, ss:*

T. F. McKennon, of lawful age, being first duly sworn, deposes and says:

That he is a resident of the City of Guthrie, Logan County, Oklahoma Territory, and knows what the controversy in the above entitled cause is; that the cause of the action of the said W. B. Ward, plaintiff below, and his judgments therein as rendered by the district court of Logan County, Oklahoma Territory, and affirmed by the Supreme Court of said Territory, are for the recovery of money as well as the foreclosure of a trust deed, and that his said judgment, when the same was rendered in said district court on the 16th day of March, 1903, was for the sum of Five Thousand, Seven Hundred and Ninety-seven Dollars ($5797.00), and that the said judgment amounted, when the judgment and decision in this cause was rendered and entered by the Supreme Court of the Territory of Oklahoma on September 7, 1905, to more than said sum and to more than Five Thousand Dollars ($5000.00); that the amount involved in this controversy therefore, exceeds Five Thousand Dollars, exclusive of costs and interest, and that no part of said judgment has been paid or remitted.

Affiant further says that he has resided continuously in the City of Guthrie, Logan County, Oklahoma Territory, for more than ten (10) years last past, and during said time has been and still
32 is familiar with the values of real estate therein, including the dates of the judgments in said action both in said district court and in said Supreme Court, and he further says, that he is also familiar with and knows well the real estate involved in this action, both in the City of Guthrie and in the City of Oklahoma City, and knows the aggregate value thereof, and states that the said value of the said real estate exceeded Five Thousand Dollars on the dates, March 16, 1903, and September 7, 1905, and at this time and at all times since March 16, 1903; and that the amount involved in this controversy therefore exceeds Five Thousand Dollars, exclusive of costs and interest.

Affiant further says, that he makes this affidavit in behalf and for the benefit of the said complainants and appellants.

T. F. McKENNON.

Subscribed and sworn to before me this 12th day of June A. D. 1906.

R. R. CARLIN,
Notary Public.

[SEAL.]

Term expires Jan. 30, 1910.

Endorsed: 1483—Southern Pine Lumber Co., *et al.*, Plaintiffs in error *vs.* W. B. Ward, *et al.*, Defendants in error.—Affidavit—Filed June 12, 1906, Benj. F. Hegler, Clerk Supreme Court.

33 And afterward, on the same day, June 12, 1906, there was filed in said cause an Order allowing the Appeal, which Order reads in words and figures as follows, to wit:

34 In the Supreme Court of the Territory of Oklahoma.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation ET AL., Appellants,
vs.
W. B. WARD ET AL., Appellees.

Order.

Now on this 12th day of June, 1906, comes the plaintiffs in error, by their attorneys, John H. Cotteral and C. G. Hornor, and file herein and present to the Court their petition for an appeal and assignments of error, praying an allowance of an appeal, and that a transcript of the record and proceedings herein, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court and the undersigned Chief Justice thereof, does allow the appeal and direct and command the Clerk of this Court to transmit to the said Supreme Court of the United States, a true and certified transcript of the records and all papers files and proceedings herein.

It is further ordered that the appellants shall give bond in the sum of Three Thousand Dollars ($3,000.00), to be approved by the Clerk of this Court, within twenty five days from this date, and upon so doing, these proceedings upon appeal and said bond shall operate as a supersedeas and as a stay of all proceedings herein in the Supreme Court of the Territory of Oklahoma, and in the District Court of Logan County, said Territory, pending the said cause in the Supreme Court of the United States.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma Territory.

Attest:
BENJ. F. HEGLER,
[SEAL.] *Clerk of the Supreme Court of the Territory of Oklahoma.*

Endorsed: 1483—Southern Pine Lumber Co., *et al.*, Appellants, *vs.* W. B. Ward *et al.*, Appellees—Order—Filed June 12, 1906, Benj. F. Hegler, Clerk of the Supreme Court.

35 And afterward, on the Sixth day of July, 1906, there was filed in said cause a supersedeas bond, which supersedeas bond reads in words and figures as follows, to wit:

36 In the Supreme Court of the Territory of Oklahoma.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation ET AL.
vs.
W. B. WARD ET AL.

Supersedeas Bond.

Know all men by these presents, That we, The Southern Pine Lumber Company, a corporation, and T. L. L. Temple, as principals, and U. C. Guss and P. T. Walton, as sureties, are held and firmly bound unto W. B. Ward, The Southern Pine Lumber Company, a partnership, composed of T. L. L. Temple and Benjamin Whittaker, G. M. D. Grigsby and D. J. Grigsby, partners as Grigsby Brothers, J. W. McNeal, Charles Griswold, J. D. De Bois, Hattie P. De Bois, J. D. Elder, William H. Dugan, Anna Bannister, E. L. Blincoe, and The American Exchange Bank, a corporation, appellees and defendants in error, and each of them, in the full and just sum of Three Thousand Dollars ($3000.00) to be paid to them, their successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, successors and administrators, jointly and severally, by these presents:

Sealed with our seals and dated this 30th day of June, in the year of our Lord, one thousand nine hundred and six.

The conditions of this obligation are as follows:

Whereas, on the 7th day of September A. D., 1905, at a session of the Supreme Court of the Territory of Oklahoma, holden at the City of Guthrie in said Territory, and in a suit pending in said Court between the said The Southern Pine Lumber Company, a corporation, and others, as plaintiffs in error, and the said W. B. Ward, and others, as defendants in error, being cause number 1483, there was a judgment rendered against the said plaintiffs in error, and
37 in favor of the said defendants in error, namely, W. B. Ward, G. M. D. Grigsby and D. J. Grigsby, affirming a certain judgment of the district court of Logan County, Territory of Oklahoma, in favor of the said W. B. Ward for the recovery of money in the aggregate sum of Five Thousand, Seven Hundred and Ninety-Seven Dollars, ($5,797.00) with interest and costs, and the foreclosure of a trust deed and for other pertinent relief, and in favor of the said G. M. D. Grigsby and D. J. Grigsby, quieting the title in them to certain real estate involved in said action, and for costs and other pertinent relief; and

Whereas, on the 11th day of January, A. D. 1906, at a session of the Supreme Court of said Territory, holden at the city of Guthrie, the said Court denied the petition of the said plaintiffs in error for a rehearing and reversal of said judgment, and the plaintiffs in error,

having obtained an appeal and writ of error, and filed a copy thereof in the Clerk's office of said Supreme Court, to reverse said judgment of the 7th day of September, A. D. 1905, and the order denying the rehearing thereof, and a citation having been issued to said appellees and defendants in error, citing and admonishing them to be and appear at a session of the Supreme Court of the United States of America, to be holden at the City of Washington, within thirty days from this date.

Now, the condition of the above obligation is such that if the said The Southern Pine Lumber Company, a corporation, T. L. L. Temple, G. W. R. Chinn and Mrs. G. W. R. Chinn, shall prosecute said appeal and writ of error to effect, and answer all damages and costs if they fail to make their said plea good, then this obligation to be void, otherwise to remain in full force and virtue.

SOUTHERN PINE LBR. CO.
T. L. L. TEMPLE, *Pt.*
T. L. L. TEMPLE.
U. C. GUSS.
P. T. WALTON.

F. W. AFFENHAUSER,
[SEAL.] *Secretary.*

38 UNITED STATES OF AMERICA,
Territory of Oklahoma, Logan County, ss:

U. C. Guss, of lawful age, being duly sworn upon oath, deposes and says, that he is the within named surety, that he is a resident of Logan County, Oklahoma Territory, and that he is worth the sum of six thousand (6000.00) — over and above his debts, liabilities, and exemptions.

U. C. GUSS.

Subscribed and sworn to before me this July 2, A. D. 1906.
[SEAL.] J. H. NORRIS,
Clerk Dist. Court.

My Com. expires —.

UNITED STATES OF AMERICA,
Territory of Oklahoma, County of Logan, ss:

P. T. Walton, of lawful age, being duly sworn upon oath, deposes and says, that he is the within named surety, that he is a resident of Logan County, Oklahoma Territory, and that he is worth the sum of six thousand dollars ($6,000.00) over and above his debts, liabilities, and exemptions.

P. T. WALTON.

Subscribed and sworn to before me this day *of* July 6, 1906, A. D.
[SEAL.] T. F. McKENNON,
Notary Public.

My Commission expires March 1st, 1910.

The above and foregoing bond approved by me this July 6, 1906.
[SEAL.] BENJ. F. HEGLER,
Clerk Supreme Court.

Said Bond is endorsed on back as follows, to wit: No. 1483—The Southern Pine Lumber Company *et al. vs.* W. B. Ward *et al.*—Supersedeas Bond—Filed July 6, 1906, Benj. F. Hegler, Clerk Supreme Court.

39 In the Supreme Court of the Territory of Oklahoma.

Cause Number 1483.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation; T. L. L. TEMPLE, G. W. R. CHINN, and MRS. G. W. R. CHINN, Plaintiffs in Error,

vs.

W. B. WARD; THE SOUTHERN PINE LUMBER COMPANY, a Partnership Composed of T. L. L. Temple and Benjamin Whittaker; G. M. D. GRIGSBY and D. J. GRIGSBY, Partners as Grigsby Brothers; J. W. MCNEAL, CHARLES GRISWOLD, J. D. DE BOIS, HATTIE P. DE BOIS, J. D. ELDER, WILLIAM H. DUNGAN, ANNA BANNISTER, and E. L. BLINCOE, Defendants in Error.

Petition in Error.

Come now the said plaintiffs in error, and each and all of them, namely, The Southern Pine Lumber Company, a corporation, and T. L. L. Temple, G. W. R. Chinn, and Mrs. G. W. R. Chinn, his wife, and complain of the said defendants in error, and each and all of them, for that the said defendants in error at the February Term, 1903, of the District Court of Logan County, in the Territory of Oklahoma, did, by the consideration of said Court, recover certain judgments and obtain certain orders against these plaintiffs in error, in a certain action then pending in the said Court, wherein the defendant in error, W. B. Ward, was plaintiff, and the said plaintiffs in error, and the said other above named defendants in error were defendants. The original case made in said action, duly certified, attested, settled and filed, the same being also a transcript, is hereto attached, marked "Exhibit A," and made a part of this petition in error:

These plaintiffs in error aver that there is error in the said record and proceedings, in this, to wit:

1. The said District Court erred in overruling the motions of the plaintiffs in error for a new trial.

2. The said District Court erred in not rendering judgment for these plaintiffs in error, and in not ordering, adjudging and
40 decreeing, in the said District Court, that the said plaintiff, W. B. Ward, and the said defendants, G. M. D. Grigsby and D. J. Grigsby, partners as Grigsby Brothers, and each of them,

take nothing by said action, that the said action be dismissed, and that the costs thereof be taxed to the said plaintiff and said Grigsby Brothers, and in not ratifying, confirming and approving the title of these plaintiffs in error in and to the real estate involved in said action, together with the tenements, hereditaments and appurtenances thereunto belonging and appertaining.

3. The said District Court erred in that the said judgments therein rendered and the said other orders therein, including the orders overruling the motions for a new trial and to set aside and vacate, the findings and judgments therein, and each and all of them, are contrary to law and not sustained by sufficient evidence and are contrary to the evidence and are contrary to equity.

4. The said District Court — in overruling the demurrers of these plaintiffs in error to the petition in said action below, and the answer and cross-petition, and each of them, of the said Grigsby Brothers in said Court below.

5. The said District Court erred in admitting evidence on the part of the plaintiff and the said other defendants in the said District Court.

6. The said District Court erred in refusing and ruling out competent and legal evidence on the part of these plaintiffs in error.

7. The said District Court erred in not finding, holding, ordering, adjudging and decreeing that the plaintiff in said District Court has no claim, lien, demand or security of any kind upon the premises involved in said action.

41 8. The said District Court erred in not finding, holding, ordering, adjudging and decreeing that the said Grigsby Brothers, and each of them, be barred from asserting any title to the real premises involved in said action, and be divested of all title thereto.

9. The said District Court erred in permitting the attack which was made and a collateral attack upon the pleadings, papers, files, proceedings, orders and judgment in a certain former action wherein the defendant in error, The American Exchange Bank, was plaintiff, and the Southern Pine Lumber Company *et al.* were defendants.

10. The said District Court erred in holding the said judgment in said former action invalid upon direct, or any other, attack.

11. The said District Court erred in not ascertaining the status and condition of the said real premises with reference to improvements and buildings thereon, and in not requiring the plaintiff and said Grigsby Brothers to do equity and to pay for said improvements, and in not applying the laws of the Territory of Oklahoma to said action.

Wherefore, the plaintiffs in error, and each of them, pray that said orders and judgments, and findings, and holdings, and each and every adverse finding, holding, order and judgment in said action so rendered may be reversed, set aside, and held for naught, and that a judgment may be ordered to be rendered in favor of these plaintiffs in error, and against the defendants in error, and that the plaintiffs in error be restored to all rights they have lost by the

rendition of said judgments and orders, and for such further relief as to the Court may seem just.

J. D. COOK AND
COTTERAL & HORNOR,
Attorneys for Plaintiffs in Error.

Filed March 16, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

42 Case-made.

Filed March 16, 1904.

THOS. A. NEAL,
Clerk District Court.

Filed March 16, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

43 Case-made.

Filed March 16, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

44 In the District Court of Logan County, Oklahoma Territory.

W. B. WARD, Plaintiff,

vs.

F. E. PENTECOST, Trustee of an Express Trust, to the Use and Benefit of the National Bank of Jefferson, Jefferson, Texas, *cestui que trust*, and THE SOUTHERN PINE LUMBER CO., a Corporation Organized and Existing under the Laws of the State of Arkansas, and T. L. L. TEMPLE and BENJAMIN WHITTAKER, Partners under the Firm Name and Style of the Southern Pine Lumber Company, and G. M. D. GRIGSBY and D. J. GRIGSBY, Partners Composing the Firm of Grigsby Brothers, in the County of Marion, in the State of Texas, and J. W. McNEAL, CHARLES GRISWOLD, HATTIE P. *De* BOIS, J. D. ELDER, WILLIAM H. DUNGAN, ANNA BANNISTER, G. W. R. CHINN and MRS. G. W. R. CHINN, His Wife, and T. L. L. TEMPLE, and All Persons Claiming, under or through the Southern Pine Lumber Company or T. L. L. Temple, Any of the Property Hereafter Described in this Petition, Defendants.

Be it remembered, that heretofore, to wit, on the 5th day of May, 1900, the said plaintiff, W. B. Ward, commenced his action against said defendants by filing in the District Court of Logan County,

Oklahoma Territory, of that date, his petition, which with the endorsements thereon is in words and figures as follows, to wit:

45 In the District Court of Logan County, Oklahoma Territory.

W. B. WARD, Plaintiff,

vs.

F. E. PENTECOST, Trustee of an Express Trust, to the Use and Benefit of the National Bank of Jefferson, Jefferson, Texas, *cestui que trust*, and THE SOUTHERN PINE LUMBER CO., a Corporation Organized and Existing under the Laws of the State of Arkansas, and T. L. L. TEMPLE and BENJAMIN WHITTAKER, Partners under the Firm Name and Style of the Southern Pine Lumber Company, and G. M. D. GRIGSBY and D. J. GRIGSBY, Partners Composing the Firm of Grigsby Brothers, in the County of Marion, in the State of Texas, and J. W. MCNEAL, CHARLES GRISWOLD, HATTIE P. DE BOIS, J. D. ELDER, WILLIAM H. DUNGAN, ANNA BANNISTER, G. W. R. CHINN and MRS. G. W. R. CHINN, His Wife, and T. L. L. TEMPLE, and All Persons Claiming, under or through the Southern Pine Lumber Company or T. L. L. Temple, Any of the Property Hereinafter Described in this Petition, Defendants.

Petition.

Comes the plaintiff and for a cause of action against the defendants allege:

That F. E. Pentecost, defendant nominal, is a citizen and resident of Oklahoma Territory and has been at all times since and prior to the acts herein complained of; that the National Bank of Jefferson, Jefferson, Texas, *cestui que trust*, was at the time and prior to the acts herein complained of, a legally organized and existing corporation under the laws of the United States of America; that the Southern Pine Lumber Company, a corporation, defendant, is now and has been prior to and at all times since the acts herein complained of, a legally organized and existing corporation under the laws of the State of Arkansas; that T. L. L. Temple and Benjamin Whittaker, partners under the firm name and style of the Southern Pine Lumber Company, defendants, were at the time and commission of the acts herein complained of, partners doing business in the

46 State of Texas.

That G. M. D. Grigsby and D. J. Grigsby, partners, composing the firm of Grigsby Brothers, defendants, were at the time of the acts herein complained of, doing business under the said firm name and style of Grigsby Brothers, in the County of Marion and State of Texas; that J. W. McNeal, Charles Griswold, Hattie P. De Bois, J. D. Elder, W. H. Dungan, Anna Bannister, G. W. R. Chinn and Mrs. G. W. R. Chinn, defendants, are all citizens and residents of Oklahoma Territory except Charles Griswold, W. H. Dungan, J. D. Elder, Anna Bannister; that the Southern Pine Lumber Company and T. L. L. Temple are non-residents of the

Territory of Oklahoma and were at the time of the acts herein complained of.

That on to wit, the 11th day of June, A. D. 1891, Grigsby Brothers partners doing business under the firm name and style of Grigsby Brothers, composed of G. M. D. Grigsby and D. J. Grigsby and doing business in the County of Marion and state of Texas, made and executed their certain promissory note for the sum of Five Thousand ($5,000) Dollars due ninety (90) days after date and bearing interest at the rate of one per cent. per month from maturity until paid and providing for ten per cent. to be taxed and collected if sued upon or placed in the hands of attorneys for collection; said note being signed by Grigsby Brothers and thereupon endorsed by Grigsby Brothers and negotiated, sold and transferred by them to the National Bank of Jefferson, Jefferson, Texas, before the maturity of said note, to secure said bank in the loan of said sum of money to them, the said Grigsby Brothers, partners as aforesaid, which said sum of money the said bank did then and there loan Grigsby Brothers, partners as aforesaid, in good and lawful money of the United States of America, a copy of said note is hereto attacked Marked "Exhibit A" and made a part hereof.

47 That thereafter, on to wit, the 27th day of July A. D. 1891, at the time said note was negotiated and prior to its maturity, G. M. D. Grigsby and D. J. Grigsby, composing the partnership of Grigsby Brothers as aforesaid, makers and endorsers of said note, then and there made and executed to F. E. Pentecost, of Guthrie, Oklahoma Territory, as trustee for the use and benefit of the said National Bank of Jefferson, Jefferson, Texas, their certain deed in writing, duly and legally executed, signed, sealed and acknowledged by them as required by law, and delivered to F. E. Pentecost as trustee therein named, and conveying the following described property to said Pentecost to secure the payment of their said promissory note payable to the said National Bank of Jefferson, Jefferson, Texas, as aforesaid; and among other recitals, covenants, conditions and agreements said deed of trust provides as follows:

Know all men by these presents, That we, G. M. D. Grigsby and D. J. Grigsby (composing the firm of Grigsby Brothers) of the County of Marion, in the State of Texas, for and in consideration of the sum of Ten Dollars ($10.00) paid by F. E. Pentecost, of the City of Guthrie, in the *State* of Oklahoma, the receipt of which is hereby acknowledged, have sold and by these presents do sell, transfer, convey and confirm unto the said F. E. Pentecost and his successors in this trust the following described property, to wit: An undivided four-fifths interest in and to Lots seventeen (17) eighteen (18), nineteen (19), twenty (20) and twenty-one (21), in block sixty (60) in Oklahoma City, in accordance with the recorded plat thereof in the Territory of Oklahoma; and also an undivided four-fifths interest in and to said undivided five-tenths or one-half interest in Lots Nos. four (4), five (5), six (6), seven (7) and twenty-one (21) in block No. forty-three (43) in the Town of Guthrie,

according to the recorded plat thereof in the Territory of
48 Oklahoma; also an undivided four-fifths interest in Lot nine (9) in block fifty-four (54) Guthrie Proper; also an undivided four-fifths interest in and to an undivided half interest in Lots Nos. twelve (12) and eleven (11) in Block No. forty-three (43) on Cleveland Avenue, East Guthrie, according to the recorded plat thereof in the Territory of Oklahoma; also an undivided four-fifths interest in and to an undivided half interest in lot fifteen (15) in block fifty-one (51) Harrison Avenue, East Guthrie, according to the recorded plat thereof, together with all and singular the rights, numbers, hereditaments and appurtenances to the same in any manner belonging or appertaining, to have and to hold all and singular the property described unto the said F. E. Pentecost or substitute, forever.

And we do by these presents bind ourselves, our heirs, executors and administrators to warrant and forever defend all and singular the said property unto the said F. E. Pentecost, or his substitutes herein against the claim or claims of any and all persons whatsoever claiming or to claim the same or any part thereof. This conveyance however is intended as a trust for the better securing of the National Bank of Jefferson, of the County of Marion, and State of Texas, in the payment of a certain promissory note of which the following is a substantial copy." * * *

The said trust deed then proceeds with the usual recitals and conditions for the sale of property upon default in payment of note and giving power to appoint substitute, etc. A certified copy of said deed of trust is hereto attached, marked exhibit "B" and made a part hereof.

Plaintiff further avers that on to wit, the 31st day of July, A. D. 1891, said deed of trust was duly filed for record in the County of
49 Logan, and County of Oklahoma, in the Territory of Oklahoma, and was by the Register of Deeds of the several counties duly recorded on the first day of August, A. D. 1891, and still remains of record undischarged.

Plintiff further avers that at the time said deed of trust was executed and recorded as aforesaid, that said property and all of it included in said conveyance or trust deed was free and clear of all claims, liens, mortgages, judgments or other liens or charges of any kind or character and passed to the trustee herein and *cestui que trust*, free and clear of all estates, charges, liens, or incumbrances, of any kind or character, and has never since by either the trustee *of cestui que trust* herein been encumbered, sold or disposed of in any manner, except the sale and assignment of said note and trust deed to the plaintiff herein, hereinafter mentioned, nor has it ever been sold on the judgment or order of any court in any action against them or either of them nor has it ever been sold for taxes due thereon or by order or judgment of any court of competent jurisdiction.

Plaintiff further avers that the said National Bank of Jefferson, Jefferson, Texas, *cestui que trust*, and the said F. E. Pentecost, trustee, accepted said trust and property and that the same has never been discharged; plaintiff further avers that the note and trust deed herein

executed by said Grigsby Brothers and negotiated as aforesaid was on the — day of —, 189-, each sold and assigned by the said National Bank of Jefferson, Jefferson, Texas, *cestui que trust* and the trustee therein for a valuable consideration, to the plaintiff herein, W. B. Ward. Plaintiff further avers that said sale and assignment of said note and deed of trust to him was made and completed before the maturity of said note and deed of trust and was made for a valuable consideration paid in good faith. Plaintiff further
50 avers that he has never sold, assigned, transferred or incumbered said note or property included in said deed of trust, since receiving said note and deed, but that he is now the legal owner and holder of said note and deed of trust and that there is now due and unpaid on said note the sum of Five Thousand ($5,000) Dollars, principal, and the sum of $5075.00 Five Thousand and Seventy-five Dollars interest accrued and due on said note at the date of filing this petition, Feb. 26th, 1900; there is the further sum of $1007.50 One Thousand and Seven and one-half Dollars, the same being ten per cent. of the principal of said note due and collectible according to the terms thereof as attorneys' fees in the prosecution of this suit, making in the aggregate the sum of Eleven Thousand and Eighty-two and fifty hundredths Dollars ($11,082.50) now due.

Plaintiff further avers that on to wit, the 11th day of June A. D. 1895, at the request of defendant, Grigsby Brothers, the note and deed of trust was extended and it was then renewed by said Grigsby Brothers, said extension being granted however for a period of ninety days from the date thereof, in accordance with the face of said note, that said note, — interest and attorneys' fees is now due and wholly unpaid, although plaintiff *have* made demand for the same.

Plaintiff further avers that the said trust deed contained a provision, among others, to the following effect; that in the event of a failure or default in the payment of said promissory note, with interest thereon accrued according to its terms and face at the maturity of the same, then in such event the said F. E. Pentecost is by these presents fully authorized and empowered, and it is made his special duty at the request of the said National Bank of Jefferson, at any time after the maturity of said promissory note to sell the
51 above described lots of land to the highest bidder for cash in hand at the court house door of the county where situated, and giving public notice of the time, place and terms of said sale, etc.

Plaintiff further avers that said note is now due and has been for a long period of time; that the said F. E. Pentecost as such trustee was requested to sell said property as provided in said deed by reason of the condition broken therein as above set forth, which he failed and refused to do. Plaintiff further avers that the said trustees was requested to prosecute this suit and was made a plaintiff in the action and he refused to prosecute the suit as such trustee or to allow his name to be used as plaintiff. Plaintiff further avers that at this time the *cestui que trust* being a corporation, has gone into the hands of a receiver, and has expired and cannot be made a

CLOSE IN CENTER

party plaintiff or defendant or compelled to perform any act in the premises. The plaintiff tenders all legal charges he may have against the property herein for services as trustee and asks the court to compel him to convey said property held in trust to this plaintiff and that plaintiff recover his costs against said trustee.

Plaintiff further avers that each and all of the conditions contained in said trust deed have been broken. That the property included in said trust deed here sought to be foreclosed — situated in the Counties of Logan and Oklahoma, in the Territory of Oklahoma, the greater portion of said property being situated in the County of Logan, Oklahoma Territory.

Plaintiff further avers that an action on the note and to foreclose the deed of trust here in suit was commenced in the District Court of Logan County, O. T., against the above defendant, on the 11th day of April, 1899, but that said action failed on account of the
52 refusal of the trustee to prosecute and there being no proper plaintiff; that said suit did not fail on its merits.

Second.

Plaintiff further avers that the defendants, the Southern Pine Lumber Company, a corporation, and that the defendants the Southern Pine Lumber Company, a partnership, and J. W. McNeal, Charles Griswold, Hattie P. De Bois, J. D. Elder, William H. Dungan, Anna Bannister, G. W. R. Chinn and Mrs. G. W. R. Chinn, his wife, claim to have and to hold some interest in and to the property included in this trust deed, equal to or superior to the title of the plaintiff herein, but plaintiff alleges that they are mere trespassers upon the property herein and have no legal or equitable right or claim to the property claimed by them and set forth in said deed of trust; plaintiff further avers that they are informed and believe and therefore state as a fact that the said defendants herein last named claim some estate or interest in said property by reason of being purchasers or holding under purchasers at an execution sale of said property under and by virtue of an execution issued out of the District Court of Logan County, Oklahoma Territory, on a judgment of said court and on an order of sale issued by the judge of the district court of Oklahoma County, and on a judgment of the District court of Logan County above referred to; that said judgment was entered in the case of the American Exchange Bank, a corporation organized under the laws of the State of Missouri, as plaintiff, and against T. L. L. Temple and Benjamin Whittaker, partners as the Southern Pine Lumber Company, and the Southern Pine Lumber Company, a corporation, under the laws of the State of Arkansas, and D. J. Grigsby, T. L. L. Temple and G. M. D. Grigsby, partners under the firm name and style of the Union Mills Lumber Company, as defendants and the only defendants, said case being numbered 1824, and the amended petition in this case being
53 filed in the court of Logan County aforesaid on the 17th day of December, 1894, and the judgment in said court bearing date of March 2nd, 1895; and said property was sold on said judg-

ment and on an order of said court based on said judgment bearing date of July 18th, 1895, and was sold on said date.

Plaintiff further avers that neither himself nor the National Bank of Jefferson, *cestui que trust* or trustee, F. E. Pentecost, were ever made a party to said suit or judgment and that neither the plaintiffs nor the defendants nor either of them in said last mentioned case had any interest in the property sold to satisfy this judgment, and included in the trust deed of plaintiff, by purchase, mortgage or other lien; nor did they have any interest by virtue of having bought any of said property at tax sale and had no interest therein of any kind.

Plaintiff further avers that at the time the above suit was filed, judgment entered and the property sold and for a long time prior thereto, and at all times since this plaintiff has held the legal title to said property included in said trust deed, and had their deed of record in the several counties in which said property is situated.

Plaintiff further avers that the sheriff of the several counties who sold said property on said judgment, together with the plaintiff and defendants in said cause and the purchasers at said sale, all had constructive and actual notice of the trust deed herein, and that the chain of title in this plaintiff was unbroken and of record, all of which they well know and disregarded. Plaintiff avers that all proceedings had in said cause are null and void and of no effect for the reason no service was ever had, made or procured in said cause against any of the defendants therein named or against the trustee or *cestui que trust* named aforesaid or against this plaintiff
54 herein; the attempted service by publication being void.

Wherefore, plaintiff prays that the defendants herein be required to answer as to their claims and interest if any they have in said property, and the respective deeds of conveyance to them, if any they have, be adjudged by this court null and void and be cancelled, and the title herein be quieted in these plaintiffs, and that plaintiffs have judgment for the sum of Five Thousand Dollars, principal due on said note, and $5075.00 accrued interest due thereon and $1075.50 dollars attorneys' fee in the aggregate $11082.50 and that a decree be entered by this court foreclosing the trust deed herein and that said property be by this court sold to satisfy plaintiffs' judgment, together with the costs of this suit and for all other proper relief plaintiffs may be entitled to in the premises.

(Signed) BUCKNER & SONS,
Attorneys for Plaintiff.

55 TERRITORY OF OKLAHOMA, *County of Logan, ss:*

George W. Buckner, being duly sworn on oath, says: That the plaintiff is a non-resident of the Territory of Oklahoma; that he is one of plaintiff's attorneys in this cause, and that he therefore verifies this petition for him; that he has read the same and knows the contents thereof to be true, as he verily believes.

(Signed) GEORGE W. BUCKNER.

Subscribed and sworn to before me this 5th day of May, 1900.

(Signed) T. A. NEAL,

[SEAL.] *Deputy Clerk Dist. Court.*

56 EXHIBIT "A."

"The National Bank of Jefferson.

$5000.00. JEFFERSON, TEXAS, *June 11th*, 1891.

Ninety days after date we promise to pay to the order of ourselves at the National Bank of Jefferson, in the City of Jefferson, Texas, the sum of Five Thousand Dollars, for value received, negotiable and payable without defalcation or discount with interest at the rate of 1 per cent. per mo. from maturity until paid and 10 per cent. attorneys' fees if sued upon or placed in the hands of an attorney for collection.

(Signed) GRIGSBY BROS.

Endorsed on back as follows, to wit:

"Grigsby Bros." also "For a valuable consideration heretofore received by us from the Nat'l Bank of Jefferson, Texas, we hereby acknowledge the justness of this note and renew our promises to pay the same.

(Signed) GRIGSBY BROS."

"June 11th, '95."

EXHIBIT "B."

G. M. Grigsby and D. J. Grigsby to F. E. Pentecost.

Deed of Trust.

STATE OF TEXAS, *County of Marion:*

Know all men by these presents: That we, G. M. Grigsby and D. J. Grigsby, (comprising the firm of Grigsby Bros.) of the county of Marion in the State of Texas, for and in consideration of the sum of Ten Dollars, paid by F. E. Pentecost of the city of Guthrie,
57 in the State of Oklahoma, the receipt of which is hereby acknowledged, have sold, and by these presents do sell, transfer, convey and confirm unto the said F. E. Pentecost and to his successors in trust the following described property, to wit:

An undivided 4-5 interest in and to Lots 17, 18, 19, 20, and 21, in Block 60, in Oklahoma City, in accordance with the recorded plat thereof, in the Territory of Oklahoma; also an undivided 4-5 interest in and to an undivided 5/10 or 1/2 interest in Lots Nos. (4) four, (5) five, (6) six, (7) seven, and (21) twenty-one in Block No. 43 in the town of Guthrie, according to the recorded plat thereof in the Territory of Oklahoma; also an undivided 4-5 interest in Lot (9) in Block No. (54) fifty-four, Guthrie Proper, according to the recorded plat thereof, Territory of Oklahoma; also an undivided

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4/5 interest in and to an undivided half interest in Lots (11) eleven, and twelve (12) Block (43) forty-three on Cleveland Avenue, East Guthrie, according to the recorded plat thereof, Territory of Oklahoma; also an undivided 4/5 interest in and to an undivided ½ interest in Lot (15) fifteen, Block (51) fifty-one on Harrison Avenue, East Guthrie, according to the recorded plat thereof.

Together with all and singular the rights, numbers hereditaments and appurtenances to the same in any manner belonging or appertaining.

To have and to hold all and singular the property above described unto the said F. E. Pentecost or substitute forever.

And we do by these presents bind ourselves, our heirs, executors and administrators to warrant and forever defend all and singular the said property unto the said F. E. Pentecost or his substitute herein against the claim or claims of any and all persons whatsoever claiming or to claim the same or any part thereof.

58 This conveyance, however, is intended as a trust for the better securing of the National Bank of Jefferson, of the County of Marion and State of Texas, in the payment of a certain promissory note, of which the following is a substantial copy:

The National Bank of Jefferson, Texas.

$5000.00 JEFFERSON, TEXAS, *June 11th*, 1891.

Ninety days after date we promise to pay to the order of ourselves or the National Bank of Jefferson, in the City of Jefferson, Texas, the sum of Five Thousand Dollars, for value received, negotiable and payable with interest, defalcations and discount, with interest at the rate of 1 per cent. per month from maturity until paid and ten per cent. attorneys' fees if sued upon or placed in the hands of an attorney for collection.

(Signed) GRIGSBY BROS.

and endorsed on back by Grigsby Bros., and bearing interest at the rate of 1 per cent. from maturity per month, upon payment of which promissory note according to its face and tenor, being well and truly made, then, in such case this conveyance shall become null and void and of no further force or effect, and shall be released at the cost and expense of the said F. E. Pentecost. But in case of the failure or default in the payment of said promissory note, together with the interest thereon accrued, according to its terms and face at the maturity of the same, then and in such event the said F. E. Pentecost is by these presents fully authorized and empowered and it is made his special duty at the request of the said Nat'l Bank of Jefferson, at any time made after the maturity of said promissory note, to sell the above described lots of land to the highest bidder for cash in hand at the court house door of the counties where situate and giving public notice of the time, place and terms of said sale by posting in three public places in said county, one being the court

59 house door, prior to said day of sale and to make to the purchaser or purchasers thereof a good and sufficient deed in law

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to the lands so sold with the usual covenants and warrants and to receive the proceeds of said sale, and the same to apply to the payment of said note, the interest thereon accrued and the expenses of executing said trust, including — per cent. commission to said trustee holding the remainder thereof subject to the order of ourselves the said G. M. D. and D. J. Grigsby, and — is hereby specially provided that should the said F. E. Pentecost from any cause whatever fail or refuse to act or become disqualified from acting as such Trustee, then the said President or Cashier of said National Bank shall have full power to appoint a substitute in writing who shall have the same powers as are hereby delegated to the said F. E. Pentecost and I by these presents fully ratify and confirm any and all action which the said F. E. Pentecost, or his substitute as herein provided, may do in the premises by virtue thereof.

Witness our hands and scroll for seals this 27th day of July, 1891.

G. M. D. GRIGSBY.
D. J. GRIGSBY.

60 THE STATE OF TEXAS, *County of Marion, ss:*

Before me, M. D. Tilson, a Notary Public, in and for Bowie County, Texas, on this day personally appeared D. J. Grigsby, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this 30th day of July, 1891.

M. D. TILSON,
A Notary Public, Bowie County, Texas.

Filed for record July 31st, 1891, at 5:05 p. m. Recorded August 1st, 1891, at 2.00 p. m.

H. H. BOCKFINGER,
County Clerk.

I hereby acknowledge that I have this day been served with a copy of above and foregoing instrument and same left in my office.

Witness my hand at Guthrie, May 1st, 1895.

W. W. PAINTER,
Sheriff, Logan County, Okla. Ter.,
By H. W. PAINTER, *Dept.*

Endorsed on back: No. 3011—W. B. Ward *vs.* The So. Pine Lbr. Co., *et al.*—Petition—Filed May 5, 1-00, M. C. Hart, Clerk Dist. Court.

61 And afterwards, to wit, on the 5th day of May, 1900, the plaintiff filed his praecipe for summons in said action, a copy of which instrument, with the endorsements thereon is in words and figures as follows, to wit:

In the District Court of Logan County, Territory of Oklahoma.

No. —.

W. B. WARD
vs.
So. PINE L. CO. ET AL.

To the Clerk of said Court:

Issue summons in the above entitled cause, and direct the same to the Sheriff of Logan County, Territory of Oklahoma, to or for the defendants Hattie P. DeBois, Charles Griswold, J. D. Elder, Anna Bannister, J. W. McNeal, all of Logan County, O. T., also F. E. Pentecost, trustee.

Amount claimed $11,082.50 and interest from date of filing suit at 1 per cent. per month. Action also brought to foreclose trust deed on property described in petition to quiet title to said property and other relief.

Action brought for ——

Make summons returnable 15th day of May, 1900.

Defendants required to answer on or before the 20th day of June A. D. 189–.

Dated this 5th day of May A. D. 1900.

BUCKNER & SONS,
Attorney- for Plaintiff.

Endorsed: No. 3011—District Court, Logan County, O. T.—Precipe for Summons—W. B. Ward *vs.* So. Pine L. Co. *et al.*—Buckner & Sons, Attorney—Filed May 5, 1900 M. C. Hart, Clerk Dist. Court.

62 And afterwards, to wit, on the 5th day of May, 1900, the clerk of said Court did issue a summons in said action for certain of the defendants therein, which summons was delivered to the sheriff of Logan County, Oklahoma Territory, and afterwards returned in said court on the 17th day of May, 1900. That said summons, with the endorsements thereon, is in words and figures as follows, to wit:

In the District Court of Logan County, Oklahoma Territory, First Judicial District.

UNITED STATES OF AMERICA,
Territory of Oklahoma, Logan County, ss:

The Territory of Oklahoma to the Sheriff of Logan County, in said Territory, Greeting:

You are hereby commanded to notify Hattie P. DeBois, Charles Griswold, J. D. Elder, Anna Bannister, J. W. McNeal and F. E. Pentecost, Trustee, that they have been sued by W. B. Ward in the

District Court sitting in and for said County of Logan, and that unless they answer by the 20th day of June A. D. 1900, the petition of the said W. B. Ward, Plaintiff, against them filed in the Clerk's office of said Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 15th day of May A. D. 1900.

Witness My Hand and seal of said Court, affixed at my office in Guthrie, Okla., this 5 day of May A. D. 1900.

[SEAL.] M. C. HART, *Clerk*,
By T. A. NEAL,
Deputy Clerk.

Endorsed: Suit Brought for foreclosure of Trust Deed—If the defendant fail to answer judgment will be taken for the sum of $11082.50 with interest at the rate of 12 per cent. per annum from the 5 day of May, 1900, and cost of suit.—M. C. Hart, Clerk District Court, By T. A. Neal, Deputy.—Summons—No. 3011—Ap. Doc. 7 Page 3011—District Court, Logan County, Oklahoma Territory—W. B. Ward *vs.* So. Pine Lumber Co., *et al.*—Issued May 5, 1900—Returnable May 15, 1900—Ans. Due June 20, 1900—Territory of Oklahoma, Logan County, SS.—Received this writ May 5, 190-, and as commanded therein, I summoned the following
63 persons of the defendants within named at the times following, to wit: Hattie P. DeBois—May 6th, 1900; J. W. McNeal—May 11th 1900; Charles Griswold—May 12th 1900, by delivering to each of said defendants personally, in said County, a true and certified copy of the within summons, with all the endorsements thereon.

The Following persons of the defendants within named not found in said county: J. D. Elder, Anna Bannister and F. E. Pentecost were by me not found in Logan County.

Sheriff's Fees. Service and return, first person—$.50. Serving 2 additional persons $.50. 6 copies—$1.50. Not found 3 $.15.—Total—$2.65. F. M. Rinehart, Sheriff. By C. E. Carpenter, Under Sheriff. Filed May 17 1900 M. C. Hart, Clerk.

And, also on the 5th day of May, 1900, the plaintiff did file another praecipe for summons in said action, which instrument with the endorsements thereon is in words and figures as follows, to wit:

In the District Court of Logan County, Territory of Oklahoma.

W. B. WARD
vs.
SO. PINE LUMBER CO. ET AL.

To the Clerk of said Court:

Issue publication notice in the above entitled cause, to or for the Defendants F. E. Pentecost, trustee, the So. Pine L. Co. a corporation, T. L. L. Temple and Benjamin Whittaker, composing firm of

Southern Pine Lumber Co. and G. M. D. Grigsby and D. J. Grigsby partners composing firm of Grigsby Bros. Charles Griswold, J. D. Elder William H. Dungan, Anna Bannister and T. L. L. Temple.

Amount claimed $11,082.50 and interest from date of filing suit at 1 per cent. per month.

Action also brought to foreclose trust deed on property described in petition to quiet title to said property and other relief.

Defendants required to answer on or before the 20th day of June A. D. 1900 Dated this 5th day of May A. D. 1900.

BUCKNER & SONS,
Attorneys for Plaintiff.

64 Endorsed: No. 3011 District Court of Logan County, O. T.—Precipe for summons.—W. B. Ward *vs.* So. Pine L. Co. *et al.*—Filed May 5 1900 M. C. Hart Clerk Dist Court. Buckner & Sons.

And also to wit, on the 5th day of May, 1900, the plaintiff did file in said action an affidavit for publication, which instrument with the endorsements thereon is in words and figures as follows, to wit:

In the District Court of Logan County, Oklahoma Territory.

W. B. WARD, Plaintiff,
vs.
F. E. PENTECOST, Trustee of an Express Trust, to the Use and Benefit of the National Bank of Jefferson, Jefferson, Texas, *cestui que trust*, and THE SOUTHERN PINE LUMBER COMPANY, a Corporation Organized and Existing under the Laws of the State of Arkansas, and T. L. L. TEMPLE and BENJAMIN WHITTAKER, Partners under the Firm Name and Style of the Southern Pine Lumber Company, and G. M. D. GRIGSBY and D. J. GRIGSBY, Partners Composing the Firm of Grigsby Brothers, in the County of Marion, in the State of Texas, and J. W. MCNEAL, CHARLES GRISWOLD, HATTIE P. DE BOIS, J. D. ELDER and WILLIAM H. DUNGAN, ANNA BANNISTER, G. W. R. CHINN and MRS. G. W. R. CHINN, His Wife, and T. L. L. TEMPLE, and All Persons Claiming, under or through the Southern Pine Lumber Company or T. L. L. Temple, Any of the Property Hereafter Described in this Petition, Defendants.

Affidavit for Publication.

TERRITORY OF OKLAHOMA, *County of Logan, ss:*

George W. Buckner, being first duly sworn on his oath, deposes and says: That he is attorney for the plaintiff in the above entitled cause; that the said suit is brought to recover $11,082.50 due on note and to foreclose a trust deed and quiet title to the following
65 real estate situated in Logan County, Oklahoma Territory, to wit: An undivided 4 5 interest in and to an undivided

5/10 or ½ interest in lots numbered 4, 5, 6, 7, and 21, in block No. 43, in the town of Guthrie, according to the recorded plat thereof, in the Territory of Oklahoma; also an undivided 4/5 interest in Lot No. 9, in Block No. 54, Guthrie Proper, according to the recorded plat thereof, in the Territory of Oklahoma; also an undivided 4/5 interest in and to an undivided ½ interest in Lots Nos. 12 and 11 in block No. 13 East Guthrie, according to the recorded plat thereof in the Territory of Oklahoma, also an undivided 4/5 interest in and to an undivided ½ interest in Lot No. 15, in Block No. 51, East Guthrie, according to the recorded plat thereof, in the Territory of Oklahoma; together with all the rights, numbers, hereditaments and appurtenances to the same in any manner belonging; also the following described property or real estate situated in Oklahoma County, Oklahoma *County*, to wit: Lots Nos. 17, 18, 19, 20, and 21, in Block No. 60, to an undivided 4/5 interest to said property together with all rights, numbers, hereditaments and appurtenances to the same in any manner belonging, said property being situated in Oklahoma City, Oklahoma Territory, according to the recorded plat thereof;

That the said cause of action is one of those cases in which service by publication is authorized by the laws of Oklahoma Territory;

That the said defendants, The Southern Pine Lumber Company, a corporation, and the Southern Pine Lumber Company, a partnership and T. L. L. Temple, G. M. D. Grigsby and D. J. Grigsby, composing the firm of Grigsby Brothers, Charles Griswold, William H. Dungan, J. D. Elder and Anna Bannister, F. E. Pentecost,
66 Trustee, above named are each non-residents of the Territory of Oklahoma; that defendants, the Southern Pine Lumber Company, a corporation, also as a partnership, resides and does business in the State of Arkansas, main offices at Texarkana, Arkansas; that defendant, Grigsby Brothers, reside in the County of Marion, State of Texas; that defendant Charles Griswold, resided in Muskogee, Indian Territory; that the foreign residence of defendants, Dungan and Elder and Anna Bannister, is to plaintiff unknown, but they do not reside in the Territory of Oklahoma; That service of summons cannot be made on said defendants in this, the Territory of Oklahoma and the plaintiffs with due diligence are unable to make service of summons on said defendants in the Territory of Oklahoma.

That this case is embraced in General Section 2950 Okla. Statutes 1893.

GEORGE W. BUCKNER.

Subscribed and sworn to before me this 5th day of May A. D. 1900.

T. A. NEAL,
[SEAL.] *Deputy Clerk Dist. Court.*

Endorsed on back: No. 3011. W. B. Ward *vs.* So. Pine Lbr. Co. *et al.* Affidavit. Filed May 5th, 1900. M. C. Hart, Clerk Dist. Court.

And afterwards, to wit, on the 4th day of August, 1900, the defendants the Southern Pine Lumber Company, T. L. L. Temple, G. W. R. Chinn and Mrs. G. W. R. Chinn, his wife, did file their answer in said action, which answer, with the endorsements thereon, is in words and figures as follows, to wit:

67 In the District Court of Logan County, Oklahoma Territory.

W. B. WARD, Plaintiff,

vs.

F. E. PENTECOST, Trustee of an Express Trust, to the Use and Benefit of the National Bank of Jefferson, Jefferson, Texas, *cestui que trust,* and THE SOUTHERN PINE LUMBER CO., a Corporation Organized and Existing under the Laws of the State of Arkansas, and T. L. L. TEMPLE and BENJAMIN WHITTAKER, Partners under the Firm Name and Style of the Southern Pine Lumber Company, and G. M. D. GRIGSBY and D. J. GRIGSBY, Partners Composing the Firm of Grigsby Brothers, in the County of Marion, in the State of Texas, and J. W. MCNEAL, CHARLES GRISWOLD, HATTIE P. DE BOIS, J. D. ELDER, WILLIAM H. DUNGAN, ANNA BANNISTER, G. W. R. CHINN and MRS. G. W. R. CHINN, His Wife, and T. L. L. TEMPLE, and All Persons Claiming, under or through the Southern Pine Lumber Company or T. L. L. Temple, Any of the Property Hereafter Described in this Petition, Defendants.

Answer.

Joint Answer of Defendants.

Comes the defendants, The Southern Pine Lumber Company, T. L. L. Temple, G. W. R. Chinn and Mrs. G. W. R. Chinn, his wife, and for joint answer to plaintiff's petition, states, denies, alleges and admits as follows:

Defendants admit that F. E. Pentecost, charged as defendant nominal, is a citizen of the Territory of Oklahoma, as alleged in plaintiff's complaint. Defendants admit that the National Bank of Jefferson, Jefferson, Texas, *cestui que trust,* as alleges in plaintiff's petition, was at the time and prior to the acts referred to in plaintiff's petition, a legally organized and existing corporation under the laws of the United States of America, and further state that they were doing a general banking business under the laws.

68 Defendants admit that the Southern Pine Lumber Company, a corporation, was in existence at the time of the acts declared of in plaintiff's petition, and was a legally organized and existing corporation under the laws of the State of Arkansas. Defendants admit that T. L. L. Temple and Benjamin Whittaker were partners under the firm name and style of the Southern Pine Lumber Company, but deny that they were such partners during all of the time of the transactions complained *on* in plaintiff's petition. Defendants admit that G. M. D. Grigsby and D. J. Grigsby were

partners as charged in plaintiff's petition. Defendants admit that G. W. R. Chinn and Mrs. G. W. R. Chinn, these answering defendants, are both citizens and residents of Oklahoma Territory. Defendants admit that the Southern Pine Lumber Company was during its existence and that T. L. L. Temple is now a non-resident of the Territory of Oklahoma, and was at the time of the acts referred to in plaintiff's petition. Defendants admit that on the date above charged in plaintiff's petition Grigsby Brothers, as such partners above referred to, were doing business under the firm name and style of Grigsby Brothers, that said partnership was composed of G. M. D. Grigsby and D. J. Grigsby, as alleged. Defendants admit that said G. M. D. Grigsby and D. J. Grigsby executed their certain promissory note for the sum of Five Thousand Dollars (5,000.00) at ninety (90) days after date, bearing interest at the rate of one per cent. (1%) per month from maturity until paid, and provided for ten per cent. (10%) to be taxed and collected if sued upon or placed in the hands of an attorney for collection, and that said note was signed by Grigsby Brothers, and thereupon endorsed by Grisby Brothers, negotiated, sold and transferred by them to the National Bank of Jefferson, at Jefferson, Texas, before the maturity of said note, to secure said Bank in the loan of said sum of money. Defend-
69 ants admit that the said bank did loan the said Grigsby Brothers, as partners aforesaid, the said sum of money as charged in plaintiff's petition. Defendants admit that on the 27th day of July, 1891, and before the maturity of said note, said Grisby Brothers made and executed to F. E. Pentecost of Guthrie, Oklahoma Territory, as Trustee for the use and benefit of the said National Bank of Jefferson, Jefferson, Texas, their certain trust deed in writing to secure the payment of their said promissory note to become due and payable to the said National Bank of Jefferson, Texas, as charged and set out in plaintiff's petition. Defendants further admit that said deed of trust was duly filed for record, both in the county of Oklahoma and the County of Logan, and the same was duly recorded by the Register of Deeds of the several counties, on the first day of August, A. D. 1891. Defendants further state that for lack of information they neither deny nor admit, but call for proof, that at the time of the execution of said deed of trust aforesaid, that said property and all of it included in said conveyance, was clear of all claims, liens or mortgages, judgments or other encumbrances or other charges of any kind or character, and that the same passed to the trustee herein and the *cestui que* — above referred to, free and clear of all estates charges, liens or encumbrances of every kind and character whatever. Defendants neither admit or deny, but call for proof, that said property had not been disposed of, encumbered, or in any manner affected by the trustee or the *cestui que trust* as alleged in plaintiff's petition, or that the same has not been sold on the judgment or order of any court, in any action against them, or either of them, or that it has never been sold for taxes due, either on or by order or judgment of any court of competent jurisdiction, as against these parties, as alleged in plaintiff's petition. Defendants admit

that the said National Bank of Jefferson, Jefferson, Texas,
70 *cestui que trust* and the said F. E. Pentecost, Trustee, accepted said trust and property and that the same has never been discharged, but defendants deny that the note, executed by said Grigsby Brothers and negotiated, as has been admitted, to the National Bank of Jefferson, Jefferson Texas, or that the trust deeds herein executed as admitted to F. E. Pentecost, as Trustee, was on the — day of ——, as alleged in plaintiff's petition, each sold and assigned by the said National Bank of Jefferson, Jefferson, Texas, *cestui que trust* and the trustee herein for a valuable consideration to the plaintiff in this action, W. B. Ward, and they further deny that said pretended alleged sale or assignment of said note or deed of trust was ever legally made and completed either before or after the maturity of said note, and deny that said deed of trust was transferred for a valuable consideration paid in good faith, and defendants further answering state that they deny that the said W. B. Ward is now or ever was the owner of either said note or said deed of trust by any legal sale or assignment either from the National Bank of Jefferson, as *cestui que trust*, or any one else, or that the said plaintiff petitioner herein is now interested either legally or equitably in either said note herein sued upon or the deed of trust herein sought to be foreclosed against the property described in plaintiff's petition. Defendants deny that there is now due or unpaid on said note the sum of Five Thousand Dollars ($5000) principal, and the sum of Five Thousand and Seventy-Five Dollars ($5075) interest accrued, or the further sum of One Thousand and Seven Dollars and fifty-cents ($1007.50) attorney's fees accrued, or any other sum. Defendants deny that there is any sum, amount or claim due to the plaintiff or to any other person from the said Grigsby Brothers by reason of or on account
71 of the execution and delivery of said note to the National Bank of Jefferson, Jefferson, Texas, or on account of the deed of trust executed to F. E. Pentecost, Trustee. For affirmative answer to plaintiff's petition, defendants state and allege that said note has been fully satisfied from time to time by payments and that the same were made by G. M. D. Grigsby and D. J. Grigsby, to parties holding said note and said deed of trust as the legal representatives of the National Bank of Jefferson, Jefferson, Texas, said note and security having passed both by delivery and legal title to the Receiver of said National Bank of Jefferson, Jefferson, Texas, and that the final payment was made by the said Grigsbys upon a compromise agreement between the said Grigsbys and the legal holder of said note and security, and that the said Grigsbys compromised their said indebtedness due upon said note secured by said trust deed with the Receiver of the Jefferson National Bank, Jefferson, Texas, for a large sum less than the face value due thereon, and that upon the compromise payment made by the said Grigsbys said note was surrendered to them and said deed of trust assigned to them in blank after said note secured by said trust deed had been paid off and delivered. Defendants admit that said mortgage was executed and recorded. Defendants further answering admit that F. E. Pentecost as such Trustee refused to allow his name to be used as plaintiff in

the suit filed in Logan County, Oklahoma Territory, against the above named defendants on the 11th day of April, and allege that said refusal as defendants believe, was made for the reason that the said trustee was fully advised by his original grantors, the Grigsby Brothers, through correspondence, that the note for which said deed of trust was made to him to secure had been fully satisfied, paid off, and was then in the hands of the original grantors, Grigsby Brothers.

72 Defendants admit that the *cestui que trust*, The National Bank of Jefferson, Jefferson, Texas, has failed, and was at one time in the hands of a Receiver, until its affairs were settled, and that said corporation has expired. Defendants further admit that these answering defendants G. W. R. Chinn and Mrs. G. W. R. Chinn, have and hold through T. L. L. Temple a title, interest, in said property or a part of the property, included in said trust deed and the defendant, the Southern Pine Lumber Company claims title and ownership to certain part of said property, and they charge or allege that they, G. W. R. Chinn and Mrs. G. W. R. Chinn have a complete and perfect title in fee simple, save the cloud existing by said trust deed not having been satisfied on the record, to lots seventeen (17), eighteen (18), nineteen (19), twenty (20) and twenty-one (21) in block sixty (60) in Oklahoma City, and the Southern Pine Lumber Company claims and charges that it has perfect title to all of the property described in said trust deed situate in the City of Guthrie, Oklahoma Territory, which they acquired by purchase, and they have both a legal and equitable right to the property claimed by them, and to make clear and set out their claim they state and allege that said property contained and described in said deed of trust was originally bought by the Union Lumber Mills Co., a partnership composed of G. M. D. Grigsby, D. J. Grigsby, owning certain interests, and T. L. L. Temple, owning certain interests, that in the property situate in the County of Oklahoma in the City of Oklahoma, the said G. M. D. Grigsby and D. J. Grigsby owned four-fifths interests and T. L. L. Temple owned one-fifth interest, and that in the property situate in the County of Logan, in the City of Guthrie the said Grigsbys owned four-fifths interest in an undivided one-half interest in part of the property described in said deed of trust and four-fifths interest in part of the property described in said deed of trust, and that the remaining one-

73 fifth interest of the undivided one-half interest, and the one-fifth interest in the remainder was the property of T. L. L. Temple, also partners in the Union Lumber Mills Company that being their relative interests in the Union Lumber Mills partnership. Defendants further state for answer that the American Exchange Bank brought suit in the District Court of Logan County, in a suit numbered Eighteen Hundred and Twenty-four (1824) in which final amended petition was filed on the 17th day of December, 1894, against T. L. L. Temple and Benjamin Whittaker as partners as the Southern Pine Lumber Company, and the Southern Pine Lumber Company, a corporation under the laws of the State of Arkansas, and D. J. Grigsby, T. L. L. Temple and G. M. D. Grigsby, partners under the firm name and style of the Union Lumber Mills Company,

as defendants, and that judgment was entered in said case on the 2nd day of March, 1895, that said property was levied on and sold under said judgment on the 18th day of July, 1895, and defendants here admit that neither the National Bank of Jefferson, *cestui que trust* or F. E. Pentecost, Trustee, was ever made parties to said suit or judgment, and defendants deny that the defendants in said suit had no interest in the property sold to satisfy this judgment, the same included in the trust deed here sought to be foreclosed or that T. L. L. Temple had no interest in all of said property, by purchase, as members of the partnership doing business under the firm and style of the Union Lumber Mills Company. Defendants allege that said sale made of said property so levied upon under execution and attachment, was made so as to dispose of all of the interests held by G. M. D. Grigsby and D. J. Grigsby, and T. L. L. Temple, partners under the firm style of the Union Lumber Mills Company. Defendants do not claim that said sale in any manner affected the vested rights of the *cestui que trust*, the National Bank of Jefferson, or of F. E. Pentecost, Trustee, as they then existed, but they charge
74 and allege that all the claim right and interest held by the said *cestui que trust* has been paid off and settled by compromise by said Grigsby Brothers, and that the naked legal title to said property still remains in the Trustee Pentecost as against the rights of these defendants, save and except along whatever charges and costs may be legally due him, which these defendants here tender in court in his behalf and defendants further charge that the plaintiff herein has never been known to any of the parties to these transactions or to anyone else save Grigsby Brothers, who held possession after the settlement of the note and the trust deed assigned in blank which was delivered to them upon its assignment, and that long after said assignment, and while the said Grigsby Brothers were the legal custodians and holders of said note and deed of trust both of which had served their purpose and been satisfied, save upon the record, suit was brought without authority under the name of the Trustee as referred to in plaintiff's petition, which suit was brought, as defendants verily believe at the solicitation of the said Grigsby Brothers and defendants further answering state and allege that there is no legitimate lien against said property, that the same has been satisfied and should be cancelled, and that the Trustee, F. E. Pentecost, should be directed by decree and judgment of this court to satisfy said mortgage and trust deed in such manner, either by conveyance or proper endorsement upon the record as will lodge the legal title to the property in those purchasing at the execution sale or other grantees, wherefore the premises considered defendants pray that upon the final hearing of this cause plaintiff's petition be dismissed and the property claimed by them be decreed in defendant's behalf and for such further order as may be necessary to quiet the title to said property in the respective defendants as set out and as is in keeping with law and good conscience.

J. D. COOK,
HARPER S. CUNNINGHAM,
Attorneys for Defendants.

75 STATE OF ARKANSAS, *County of Miller, ss:*

I, J. D. Cook, Attorney for answering defendant, do solemnly swear that the facts set forth in the foregoing separate answer are true to the best of my knowledge and belief, so help me God.

(Signed) J. D. COOK.

Subscribed and sworn to before me this 2nd day of Aug. A. D. 1900.

(Signed) J. C. EDWARDS,
[SEAL.] *Notary Public.*

My commission expires Dec. 9, 1900.

8/4/1900.

I hereby consent to the filing of this answer without regard to the time same was due.

BUCKNER & SONS,
Att'ys for Plaintiff.

Endorsed: No. 3011. W. B. Ward, Plaintiff, *vs.* F. E. Pentecost, Trustee, *et al*, Defendants. Joint Answer of Defendants. Filed Aug. 4, 1900, M. C. Hart, Clerk Dist. Court.

And afterwards, to wit, on the 21st day of August, 1900, the plaintiff did file his reply in said action, which instrument, with the endorsements thereon, is in words and figures as follows, to wit:

76 In the District Court of Logan County, Oklahoma Territory.

W. B. WARD, Plaintiff,
vs.
F. E. PENTECOST, Trustee, ET AL., Defendants.

Reply.

Comes the plaintiff W. B. Ward and for his reply to the joint answer of the Southern Pine Lumber Company, T. L. L. Temple, G. W. R. Chinn and Mrs. G. W. R. Chinn, his wife, filed in the above cause on August 4th, 1900, says: That he denies each and every allegation contained in said answer except the admissions therein made.

Wherefore plaintiff prays as heretofore in his petition on file in this cause and for such other relief as he may be entitled to.

BUCKNER & SONS,
Atty's for W. B. Ward.

TERRITORY OF OKLAHOMA, *County of Logan, ss:*

George W. Buckner, being duly sworn says that he is one of the attorneys for the plaintiff in the above cause; that he has read the

above reply and that the contents thereof are true as he verily believes; that the plaintiff is a non-resident of the Territory of Okla. and he therefore verifies the reply.

GEO. W. BUCKNER.

Subscribed and sworn to before me this — day of August, A. D. 1900.

——— ———.

I consent that this reply be filed out of time.

——— ———,

Att'ys for Defendants Answering August 4th, 1900.

Endorsed on back: No. 3011.—W. B. Ward *vs.* F. E. Pentecost, *et al.*, Reply. Filed Aug. 21, 1900. M. C. Hart, Clerk Dist. Court.

77 And afterwards, to wit, on the 21st day of January, 1901, the plaintiff did file his motion to dismiss the said action as to the defendant Hattie P. De Bois, which motion was duly sustained and the said action dismissed by the court as to the said defendant.

The said motion is in words and figures as follows, to wit:

In the District Court of Logan County, Oklahoma.

W. B. WARD, Plaintiff,

vs.

THE SOUTHERN PINE LUMBER CO. ET AL., Defendants.

Motion to Dismiss as to Hattie P. De Bois.

Comes the plaintiff by Geo. Buckner, his attorney, and moves the court to dismiss this cause as to the defendant Hattie P. De Bois, only striking her name from the petition as a defendant.

GEO. W. BUCKNER,
Att'y for Plaintiff.

Endorsed on back: No. 3011.—W. B. Ward *vs.* So. Pine L. Co. *et al.*—Motion. Filed Jan. 21 01. M. C. Hart, D. Clerk.

And afterwards, to wit, on the 8th day of March, 1901, the plaintiff did file a certain motion for permission to amend his petition in said action, which motion, with the endorsements thereon, is in words and figures as follows, to wit:

78 In the District Court of Logan County, Oklahoma Territory.

No. 3011.

W. B. WARD, Plaintiff,

vs.

So. PINE LUMBER CO. ET AL., Defendants.

Motion for Permission to Amend Petition.

Come the plaintiff, W. B. Ward, and moves the court to permit an amendment to his petition by inserting the following words after the last line preceding the prayer of said petition on page ten (10) thereof, to wit: "for the reason no service was ever had, made or procured in said cause against any of the defendants therein named, or against the trustee or *cestui que trust* named aforesaid, or against this plaintiff herein, the attempted service by publication being void."

Wherefore, plaintiff prays permission to make said amendment with the consent of counsel for defendants.

(Signed) BUCKNER & SONS,
Plaintiff's Att'ys.

I consent to the above amendment to the petition.

____ ____,
Att'ys for Defendants Answering.

Endorsed on back: No. 3011. Ward *vs.* So. Pine. L. Co. *et al.* Motion to Amend by Plaintiff. Filed Mar. 8, 1901. M. C. Hart, Clerk Dist. Court. Buckner.

And said motion was duly allowed and said petition was amended to correspond to said motion, all upon the order and leave of said court.

And afterwards, to wit, on the 18th day of April, 1901, the plaintiff did file another praecipe for summons in said action, for service upon the said defendant, F. E. Pentecost, which instrument with the endorsements thereon is in words and figures as follows, to wit:

79 In the District Court of Logan County, Territory of Oklahoma.

No. 3011.

W. B. WARD

vs.

So. PINE LUMBER CO. ET AL.

To the clerk of said court:

Issue summons in the above entitled cause, and direct the same to the sheriff of Logan County, Territory of Oklahoma, to or for the defendant nominal F. E. Pentecost.

Amount claimed $11,082.50 and interest from day of Judgment at 7 % per annum.

Action brought *for* to foreclose trust deed on property described in petition.

Make summons returnable within ten days from its date.

Defendants required to answer on or before *the* twenty days after summons is returnable.

GEO. W. BUCKNER,
Attorney for Plaintiff.

Dated this April 18th, 1901.

Endorsed: No. 3011. District Court. County. Praecipe for Summons. Ward *vs.* So. Pine Lumber Co. *et al.* Buckner, Attorney. Filed Apr. 18, 1901. M. C. Hart, Clerk.

And also, on said April 18th, 1901, the clerk of said court did issue a summons in said action, and delivered the same to the sheriff of said Logan County, Oklahoma Territory, who served the same and made his return thereon. Said summons, with the endorsements thereon is in words and figures as follows, to wit:

80 In the District Court of Logan County, Oklahoma Territory, First Judicial District.

UNITED STATES OF AMERICA,
Territory of Oklahoma, Logan County, ss:

The Territory of Oklahoma to the Sheriff of Logan County, in said Territory, Greeting:

You are hereby commanded to notify F. E. Pentecost defendant nominal that he has been sued by W. B. Ward in the District Court sitting in and for said County of Logan, and that unless he answer by the 17th day of May A. D. 1901, the petition of the said W. B. Ward against said F. E. Pentecost filed in the Clerk's office of said Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 27th day of April A. D. 1901.

Witness my hand and seal of said Court, affixed at my office in Guthrie, Okla., this 18th day of April A. D. 1901.

M. C. HART, *Clerk*,
By F. N. WEIRICK,
[SEAL.] *Deputy Clerk.*

Endorsed: Suit Brought for foreclosure of Trust Deed. If the defendant fail to answer, judgment will be taken for the sum of $11,082.50 with interest at the rate of — per cent. per annum from the — day of ——, 190– and cost of suit. M. C. Hart, Clerk District Court, by F. N. Weirick, Deputy. Summons. No. 3011 Ap. Doc. 7 page 311 District Court, Logan County, Oklahoma Territory. W. B. Ward *vs.* So. Pine Lumber Co. *et al.*, Issued April 18th 1901

Returnable April 27" 1901 Ans. Due May 17" 1901. Geo. W. Buckner, Att'y for Pl'tf. Territory of Oklahoma, Logan County, ss. Received this writ April 18" 1901, and as commanded therein, I summoned the following persons of the defendants within named at the times following to wit: F. E. Pentecost April 19" 1901 by delivering to each of said defendants, personally, in said county, a true and certified copy of the within summons, with all the endorsements thereon. Sheriff's Fees. Service and return, first person, $.50 Copy $.25 Total $.75. C. E. Carpenter Sheriff by John Mahoney, Under Sheriff. Filed Apr. 26, 1901. M. C. Hart, Clerk Dist. Court.

81 And afterwards, there was filed in said cause in said court, an affidavit as proof of service by publication in said action, for certain of the defendants in said action, which affidavit, with the notice attached, is in words and figures as follows, to wit:

82 *Proof of Publication.*

TERRITORY OF OKLAHOMA, *Logan County, ss:*

C. S. Brengle, of lawful age, being first duly sworn, deposeth and sayeth that he is Business Manager of the Oklahoma Daily Leader a weekly newspaper printed and published in Logan County, Territory of Oklahoma, and that a notice of which a true copy is hereto attached, was published in the regular and entire issue of each number of said paper for four consecutive weeks the first publication being made as aforesaid, on the 10th day of May, A. D. *1890*, and the last on the 31st day of May, A. D. 1900.

(Signed) C. S. BRENGLE.

Subscribed and sworn to before me this 14th day of October, 1902.

Printers' Fees.

10 Sqrs. @ 75¢	for first insertion	$7.50
10 Sqrs. @ 50	" each three subsequent insertions	15.00
		$22.50

Endorsed on back: 3011. W. B. Ward *vs.* F. E. Pentecost, *et al.* Filed Oct. 4, 1902. Thos. A. Neal, Clerk District Court.

83 *Notice.*

In the District Court of Logan County, Oklahoma Territory.

W. B. WARD, Plaintiff,

vs.

F. E. PENTECOST, Trustee of an Express Trust, to the Use and Benefit of the National Bank of Jefferson, Jefferson, Texas, *cestui que trust*, and THE SOUTHERN PINE LUMBER COMPANY, a Corporation Organized and Existing under the Laws of the State of Arkansas, and T. L. L. TEMPLE and BENJAMIN WHITTAKER, Partners under the Firm Name and Style of the Southern Pine Lumber Co., and G. M. D. GRIGSBY and D. J. GRIGSBY, Partners Composing the Firm of Grigsby Bros., in the County of Marion, in the State of Texas, and J. W. MCNEAL, CHARLES GRISWOLD, HATTIE P. DE BOIS, J. D. ELDER, WILLIAM H. DUNGAN, ANNA BANNISTER, G. W. R. CHINN and MRS. G. W. R. CHINN, His Wife, and T. L. L. TEMPLE, and All Persons Claiming, under or through the Southern Pine Lumber Company or T. L. L. Temple, Any of the Property Hereafter Described in this Petition, Defendants.

The said defendants, The Southern Pine Lumber Company, a corporation under the laws of the State of Arkansas; The Southern Pine Lumber Company, a partnership composed of Benjamin Whittaker and T. L. Temple; and G. M. D. Grigsby and D. J. Grigsby, partners under the firm name and style of Grigsby Brothers; Charles Griswold, J. D. Elder, William H. Dungan, Anna Bannister, and F. E. Pentecost, trustee, will each take notice that they have been sued in the District Court of Logan County, Oklahoma Territory, by W. B. Ward, and that unless you and each of you answer the petition of the plaintiff on file in said court, on or before the 25th day of June, A. D. 1900, said petition will be taken as true and judgment rendered accordingly against each of you as therein prayed for, to-wit: to quiet the title in plaintiff to an undivided four-fifths interest in and to an undivided five-tenths or one-
84 half interest in and to lots numbered 4, 5, 6, 7 and 21, in block No. 43, situated in the town of Guthrie, according to the recorded plat thereof, in the Territory of Oklahoma; also an undivided four-fifths interest in and to Lot No. 9, block number 54, Guthrie Proper according to the recorded plat thereof, in the Territory of Oklahoma; also an undivided four-fifths interest in and to an undivided one-half interest in lots Nos. 11 and 12, in block No. 13, East Guthrie, according to the recorded plat thereof, in the Territory of Oklahoma; also an undivided four-fifths interest in and to an undivided one-half interest in lot number 15, in block number 51, East Guthrie, according to the recorded plat thereof, in the Territory of Oklahoma, together with all the rights, numbers hereditaments and appurtenances to the same in any manner belonging, said property being situated in Logan County, Oklahoma

Territory, also the following property situated in Oklahoma County, Oklahoma Territory, with all the rights, numbers, hereditaments and appurtenances to the same in any manner belonging, to-wit: An undivided four-fifths interest in and to lots 17, 18, 19, 20 and 21, in block No. 60, Oklahoma City, Oklahoma Territory, according to the recorded plat thereof in the Territory of Oklahoma, and to foreclose a trust deed to said property described, held by plaintiff, and a decree ordering the above property sold to satisfy such judgement as plaintiff may obtain against defendants, Grigsby Brothers, on a promissory note amounting in the aggregate to the sum of $11,082.50 which said note said deed of trust was given to secure, and judgement will further be rendered against you for costs of suit.

Dated this 5th day of May, A. D. 1900.

Attest:

M. C. HART,
Clerk Dist. Court.
By T. A. NEAL, *Deputy.*

[SEAL.]

BUCKNER & SONS,
Attorneys for Plaintiff, W. B. Ward.

85 And afterwards, to-wit, on the 29th day of October, 1902, the defendants and cross-petitioners Grigsby Bros. did file another præcipe for summons in said action, which instrument with the endorsements thereon is in words and figures as follows to-wit:

In the District Court of Logan County, Territory of Oklahoma.

No. 3011.

W. B. WARD
vs.
So. PINE LUMBER CO. ET AL.

To the Clerk of said Court:

Issue summons in the above entitled cause, and direct the same to the Sheriff of Logan County, Territory of Oklahoma to or for the Defendants Edwin L. Blincoe and Jno. D. De Bois and Hattie P. De Bois——

Amount claimed, $— and —— interest from —— day of —— at —— per cent. per annum——

Action brought *for* to quiet title. Make summons returnable 1st day of November 1902.

Defendants required to answer and cross petition of defendants on or before the 21st day of November A. D. 1902.

Dated this 29 day of October A. D. *189–*.

F. H. PRENDERGAST,
Att'y for Def'ts D. J. & D. M. G. Grigsby, Cross Petitioners.

Endorsed: No. 3011—District Court, —— County, O. T.—Præcipe for Summons—Filed Oct. 29, 1902, Thos. A. Neal, Clerk.

86 And on the said 29th day of October, 1902, the clerk of said court did issue another summons in said action, which was delivered to the sheriff of Logan County, Oklahoma Territory, and served by him and afterwards returned into said court.

The said summons, with the endorsements thereon, is in words and figures as follows, to-wit:

87 In the District Court of Logan County, Oklahoma Territory, First Judicial District.

UNITED STATES OF AMERICA,
Territory of Oklahoma, Logan County, ss:

The Territory of Oklahoma to the Sheriff of Logan County, in said Territory, Greeting:

You are hereby commanded to notify Edwin L. Blincoe, John D. De Bois & Hattie P. De Bois that they have been sued by Grigsby Bros.
W. B. Ward in the District Court sitting in and for said County of Logan, and that unless they answer —— by the 21st day of Nov. A. D. 1902, the petition of the said Plaintiff against them filed in the Clerk's office of said Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 1st day of Nov. A. D. 1902.

Witness my Hand and Seal of said Court, affixed at my office in Guthrie, Okla., this 29th day of Nov. A. D. 1902.

T. A. NEAL, *Clerk.*
[SEAL.] By C. H. GRISWOLD,
Deputy Clerk.

Endorsed: Summons—No. 3011 Ap. Doc.—7 Page 311, District Court, Logan County, Oklahoma Territory. W. B. Ward *vs.* So. Pine Lumber Co. Issued Oct. 29th, 1902, Returnable Nov. 1st, 1902, Ans. Due Nov. 21st, 1902.

Suit brought *for* to quiet title. If the defendant fail to answer judgment will be taken for the sum of $— with interest at the rate of — per cent. per annum from the —— day of —— 190– and cost of suit.

T. A. NEAL,
Clerk District Court.
By C. H. GRISWOLD, *Deputy.*

88 TERRITORY OF OKLAHOMA, *Logan County, ss:*

Received this writ October 29th, 1902, and, as commanded therein, I summoned the following persons of the defendants within, named at the times following, to-wit: Edwin L. Blincoe, John D. De Bois and Hattie P. De Bois, Oct. 29, 1902.

Sheriff's Fees.

Service and return, first person	$.50
Serving—2—additional persons	.50
3 copies	.75
Total	$1.75

C. E. CARPENTER, *Sheriff.*
J. M. LAROE, *Deputy.*

Filed Nov. 1st, 1902.
T. A. NEAL, *Clerk.*

89 And also on the 29th day of October, 1902, the defendants G. M. D. Grigsby and D. J. Grigsby, with leave of court, did file their answer and cross-bill in said action, which pleading with the endorsements thereon is in words and figures, as follows, to wit:

In the District Court of Logan County, Oklahoma Territory.

No. 3011.

W. B. WARD, Plaintiff,
vs.
THE SOUTHERN PINE LUMBER CO., a Corporation Organized and Existing under the Laws of the State of Arkansas, *et al.*, and THE AMERICAN EXCHANGE BANK, a Corporation under the Laws of the State of Mo., Defendants.

Answer of G. M. D. Grigsby and D. J. Grigsby to the Suit of W. B. Ward and to the Cross-bill of the Defendants in This Suit Other Than These Two Defendants.

Comes now the defendants, G. M. D. Grigsby and D. J. Grigsby leave of the court having been first obtained, and files this their answer to the petition of the plaintiff, W. B. Ward, and to the answer or cross petition of the defendants heretofore filed herein on the — day of ——, 1901, asking affirmative relief, and these defendants allege as follows:

1st.

90 Defendants deny each and every allegation of fact and conclusion of law as set forth in said several pleadings, except those that may be hereinafter specially admitted.

2nd.

Defendants admit that they made, executed and delivered the note and trust deed herein sued on, as charged and alleged in plaintiff's petition. And defendants admit that said note and trust deed has never been paid off or discharged, nor has said trust deed ever been paid, cancelled, or released. And defendants further admit that there is now due on said note by these defendants the sum of

Five Thousand Dollars, together with the interest, as stipulated for in said note, besides the attorney's fee as charged in plaintiff's petition. Defendants admit that the plaintiff W. B. Ward, is now the legal owner and holder of said note and trust deed by assignment, as alleged in his petition. Defendants further admit that the property included in the trust deed, herein sought to be foreclosed, and deeded by these defendants in trust to secure the payment of the note herein sued on, was executed to the Jefferson National Bank of Jefferson, Texas. And that the plaintiff, W. B. Ward, has only such interest in said note and deed of trust as he received by sale and assignment thereof from H. F. Auten, as the receiver of said Jefferson National Bank. And in the assignment of said note and deed of trust to W. B. Ward, said receiver H. F. Auten was acting as the receiver of said Bank under and by virtue of the law governing national banks, and under the orders of the Comptroller of currency of the United States and under the direction of the orders, judgments and decrees of the United States Court in and for the eastern
91 District of Texas, holding sessions at Jefferson, Texas. That said H. F. Auten had and received said note and deed of trust of and from said Jefferson National Bank as a part of the assets thereof in his official capacity as the receiver thereof, and he had no other right or interest in or to said note and deed of trust.

3rd.

For answer and reply to the answer and cross-bill of the defendants in this suit, other than these two answering defendants, which answer and cross-bill pleads matters and facts directly involving both G. M. D. Grigsby and D. J. Grigsby in seeking the cancellation of said note and trust deed, and in praying for affirmative relief that said deed of trust be cancelled and released and removed as cloud from the alleged title held or set out by said other defendants and to bar the equity of redemption or excess in value of said property over the deed of trust debt of said D. J. Grigsby and G. M. D. Grigsby and in asking affirmative relief that said other defendants be quieted in their right, title, interest and claim in and to said property freed from the lien of said trust deed as well as the right title interest or claim of these defendants as to their equity of redemption or value of said property in excess of said trust deed or debt, and these defendants now say:

That both G. M. D. Grigsby and D. J. Grigsby were, at the time said note and trust deed was made, and at all times since they each have been and each are now *bona fide* citizens of the State of Texas, and never were at any time either citizens or residents of Oklahoma Territory.

That the American Exchange Bank is incorporated under the laws of the State of Missouri, having its principal office and only place of business at St. Louis, in said State. That said Bank never
92 was a citizen of the State of Texas or the Territory of Oklahoma. That all of the other defendants in this cause, other than the two Grigsbys, were at the date of the filing of this suit, citizens of either the State of Arkansas or the Territory of Oklahoma,

and were such citizens on the 1st day of January, 1892, and each and all of said other defendants have been since said date and are now each and all citizens of either Arkansas or the Territory of Oklahoma.

4th.

That the right, title, interest and claim of D. J. and G. M. D. Grigsby in and to the property described in said deed of trust which is sought to be foreclosed by W. B. Ward, plaintiff, and which is claimed adversely to said deed of trust and to said D. J. and G. M. D. Grigsby by the other defendants in this cause, is worth and of the value of Ten Thousand Dollars. That is the interest of these defendants D. J. and G. M. D. Grigsby is worth and of the value of ten thousand *value*, and this valuation and worth is separate and distinct from the other undivided interests in or of said property.

5th.

That in June, 1891, D. J. Grigsby, G. M. D. Grigsby and T. L. L. Temple were co-partners and doing business under the firm name or business style of the Union Lumber Mills Co., or the Union *Lumber Mills* Co. And the parties last named were the same parties to suit No. 1524 hereinafter referred to. That in 1891 T. L. L. Temple and Benjamin Whittaker were co-partners under the firm name or business style of the Southern Pine Lumber Company. And as such the said Temple and Whittaker either individually or as co-partners as the Southern Pine Lumber Co. were defendants in what is known and hereafter referred to as the Texas judgment. And said parties last named were also named *were also* defendants in suit No.
93 1524 hereafter referred to. But these defendants say, that said Whittaker had no interest right or title to nor was he a member of the co-partnership known as the Southern Pine Lumber Company after April, 1891, but that T. L. L. Temple was the sole member of said co-partnership or Southern Pine Lumber Company and was the sole owner of said firm, or co-partnership business of the Southern Pine Lumber Company from April, 1891, until after August 6th, 1891.

That the Southern Pine Lumber Company on the 24th day of September, 1892 was incorporated first under the laws of the State of Arkansas and on the 19th day of October, 1893, it was also incorporated under the laws of the State of Texas. And the aforesaid T. L. L. Temple was the principal stock holder and owner of the Southern Pine Lumber Company incorporated. He was the president thereof from its incorporation and at all times dominated and controlled its affairs and business.

That after April 1891 when Whittaker went out of the Southern Pine Lumber Company co-partnership the said T. L. L. Temple was the sole owner of said co-partnership and had possession and management of said co-partnership property, business and affairs.

6th.

That about July 1891 the Union Mills Lumber Company made, executed and delivered to the American Exchange Bank of St. Louis

its obligation in writing, and in which obligation the said Southern Pine Lumber Company co-partnership, and T. L. L. Temple joined as original makers of said obligation, whereby all the makers of said instrument promised to pay to the said Bank the money mentioned in said obligation according to the tenor and effect thereof.

That said obligations so executed as aforesaid was not
94 paid. And said Bank sued thereon in the 44th judicial district of the state of Texas comprising Dallas County, Texas, by suit No. 9669 with the American Exchange Bank of St. Louis, Mo., as plaintiff, and the Union Mills Lumber Company, the Southern Pine Lumber Company, co-partnership, and T. L. L. Temple as defendants, personal service being had upon D. J. Grigsby and G. M. D. Grigsby and T. L. L. Temple as co-partners known as the Union Mills Lumber Co. and upon T. L. L. Temple as an individual and upon the Southern Pine Lumber Company co-partnership. And said District Court on the 9th day of January 1892, entered its judgment against the defendants in said suit No. 9659 for the following sums.—One Thousand and twenty-two and 33/100 dollars besides all cost of that suit against the Union Mills Lumber Company and D. J. Grigsby, G. M. D. Grigsby, and T. L. L. Temple, and against the Southern Pine Lumber Company, partnership, and Benjamin Whittaker and T. L. L. Temple individually; but the Southern Pine Lumber Company incorporated either in Texas or Arkansas was not a party to or in any wise interested in the Texas suit or Judgment.

7th.

About Feb. 3rd, 1892, execution issued in cause No. 9659 to Bowie County, Texas, as provided for by law, against the defendants therein. And about Feb. 17th, 1892, the said T. L. L. Temple, one of the co-partners of the said Union Lumber Mill Company, he being the same Temple against whom said Texas judgment had been rendered, paid off and discharged said judgment, interest and costs. And the said T. L. L. Temple was then solvent. That said judgment was not paid off or discharged by or with the funds of the Southern Pine Lumber Company, incorporated. That at the date of said judgment payment by Temple, D. J. Grigsby and G. M. D.
Grigsby and the said Temple owned, as individuals, a part of
95 the property mentioned in the deed of trust sought to be foreclosed. The other portion of said property being owned by said D. J. and G. M. D. Grigsby in connection with the co-partnership of Temple and Whittaker as co-partners under the firm name of the Southern Pine Lumber Company. But at the date of said judgment payment, the Southern Pine Lumber Company, incorporated, had no interest in any part of said property. That after the payment of said Texas Judgment and without any demand for an accounting or for contribution, by reason of the payment as aforesaid, of his said co-partners, the said Temple, or the Southern Pine Lumber Company co-partnership, or as a corporation, without any right or authority in fact or in law, but in the name of the American Exchange Bank of St. Louis, Mo. it being the same plaintiff in the

Texas judgment, filed suit No. 1524 in the district court of Logan County, Oklahoma Terr. in which suit, the same American Exchange Bank of St. Louis, Mo., was made party plaintiff and T. L. L. Temple and Ben Whittaker partners as the Southern Pine Lumber Co., the Southern Pine Lumber Co., a corporation organized under the laws of the State of Arkansas, and D. J. Grigsby and G. M. D. Grigsby and T. L. L. Temple, partners under the firm name and style of the Union Mills Lumber Company, were each and all made parties defendant in said Oklahoma suit No. 1524, in which attachments were issued and levied upon the property involved in this suit, it being the same described in the mortgage herein sought to be foreclosed.

That none of the defendants in suit No. 1524 made any appearance or filed any answer nor did the defendants D. J. and G. M. D. Grigsby appear in or answer said suit, or waive service or notice or plead therein. That the pleading, upon which judgment was rendered, and the attachments issued and the service of publication was had, was an amendment, filed in this court on Dec. 17th,
1894. That judgment was had on the 2nd day of March,
96 1895, and in July thereafter an amended judgment was entered by this court, which covered all of the property involved in this suit, said property being afterwards sold under said judgments with its attachment foreclosures. And the Southern Pine Lumber Company in its co-partnership capacity, aforesaid, or in its corporate capacity, bought all the property described in said judgment 1524, and said sales were confirmed and titles ordered made, and the defendants other than the two Grigsbys claimed title by and through the proceedings in suit No. 1524 in this court. Which record is here referred to and made a part hereof. But the sufficiency of and legality of each and all of said proceeding in suit No. 1524 are here directly attacked as being null and void, not due process of law, an actual fraud upon the two Grigsby- and a fraud and imposition upon the court in which said suit No. 1524 was filed.

That the amended petition, all the attachments, and notices for service, together with the publications thereof, the judgments, the orders of sale or execution and the order or judgments confirming said sales in said suit No. 1524 are each and all null and void for this:

8th.

Because said Texas judgment was fully paid off and discharged while said Union Mills Lumber Company, co-partnership, was in existence and not dissolved, by T. L. L. Temple, when he was solvent and while a member of said Union Mills Lumber Company, he being at the date of payment, liable in both his co-partnership and individual capacity for the whole amount of said Texas judgment. And the said Temple or said Southern Pine Lumber Company
co-partnership was without right to receive from the *the*
97 American Exchange Bank any transfer to or of said Texas
judgment. And said Temple or said Southern Pine Lumber Company co-partnership was without right or authority to sue upon the Texas judgment in the name of the American Exchange Bank,

as was done in said suit No. 1524. Because said Texas judgment was fully paid off and discharged and no transfer was ever made of the Texas judgment to the Southern Pine Lumber Company, incorporated, nor was it liable as a surety upon or for the amount of the Texas judgment. And said suit No. 1524 was not one for contribution, and the Southern Pine Lumber Company as an Arkansas corporation was in no wise connected with the Texas judgment nor was its funds to pay off or discharge said Texas judgment. And by said pretended suit No. 1524 the said Temple either individually or as the then owner of the Southern Pine Lumber Company copartnership, but not incorporated, were one or the other the real plaintiff or beneficiary in said suit No. 1524 in this court, and were both plaintiffs defendants in one and the same suit. That is, in the name of the American Exchange Bank of St. Louis, Mo., the said Temple individually or as the owner of the Southern Pine Lumber Company, not incorporated, filed suit No. 1524 against the defendants, as therein shown. And said American Exchange Bank did not know of, consent to, or authorize said suit No. 1524 in this court.

9th.

That G. M. D. Grigsby, as shown by the pleadings in suit No. 1524 in this court, was not sued for the amount of the Texas judgment or for the amount that Temple paid in satisfaction
98 thereof. And the attachments, the various notices and service of publication and the judgments and sales thereunder as to G. M. D. Grigsby were each and all without pleading to support them, and to the extent of his interest in the property, and as to the amount of the Texas judgment, all the proceedings in suit No. 1524 are null and void and not due process of law.

10th.

That the act of making the Southern Pine Lumber Co., as organized under the laws of Arkansas, a party defendant in suit No. 1524 was a fraud upon this court for this, said Company was not then chartered or incorporated in June 1891 or at any time afterwards before Sept. 24th, 1892. And it was in no wise connected with or liable for the Texas judgment or claim. It was a fictitious party to suit No. 1524 and was not liable to, nor did it owe the American Exchange Bank any money at the date said suit was filed or at the date the judgment therein was rendered.

11th.

That T. L. L. Temple individually, or as an officer in or a stockholder of the Southern Pine Lumber Company incorporated procured or caused suit No. 1524 in this court to be filed either directly or indirectly through himself, the said Temple, or his attorney J. D. Cook, of Texarkana, Arkansas, who acted as such attorney therein for the said Temple or for said Southern Pine Lumber Company incorporated. And the said Cook was aided by local attorneys then residing at Guthrie, Oklahoma Territory. And the said Temple, or the said Southern Pine Lumber Company directly, or through the said Cook, paid, or caused to be paid, the attorney's fee for the institution and

prosecution of said suit No. 1524 in this court. And the American Exchange Bank at no time knew of said suit or had anything to do therewith, or received any of the proceeds thereof. And while
99 this action was going on, the said Temple and the Southern Pine Lumber Company incorporated was suing themselves by and in said suit No. 1524 without disclosure of the real facts to said court.

12th.

That in filing suit No. 1524 the pleadings thereof show an account for $294.56 which was not included in the Texas Judgment, but was an addition thereto, on to-wit Jan. 1st, 1894. And it was alleged that said account was owing by the Union Lumber Mills Company composed of Temple and the two Grigsby- as partners, to said Temple and Whittaker as co-partners in the firm name of the Southern Pine Lumber Company. And that said Temple and Whittaker as the Southern Pine Lumber Company partnership transferred said account to the Southern Pine Lumber Company and that said Southern Pine Lumber Company incorporated, had transferred said account on Jan. 1st, 1894, and long after the payment of the Texas judgment of date Feb. 17th, 1892, to the American Exchange Bank of St. Louis, Mo. And said account of $294.56 was made a part of the claim and demand sued upon in suit No. 1524 by the plea of Dec. 17th, 1894. And the property here involved was attached for said $294.56, when said amount was not included in the judgment but was included in the amount of the judgment rendered by this court in suit No. 1524. And for said sum of $294.56 in part was the property of these defendants attached, sold and now claimed by some of the defendants in this suit adverse to the Grigsby- and to said Ward and said mortgage. That the American Exchange Bank of St. Louis, Mo. never was the owner or transferee of said account and was without any knowledge thereof. And that the addition of said account for $294.56 to the amount paid by said Temple on Feb. 17th, 1892, and the institution of suit No. 1524 in this court, was not the act or deed of said Bank and to the extent of $294.56 the District court of Logan County, Oklahoma Territory was without a
100 plaintiff in said suit No. 1524, or if there was one it was a fictitious or fraudulent plaintiff. And said court was without jurisdiction to render any judgment or to issue any process or to make any order in said suit No. 1524. And to the extent of $294.56 the filing of said suit, all attachments, notices and publications, together with the judgment, the execution and orders of sale or the sale or confirmation of the property, on which adverse title to these Grigsby defendants is sought to be based, was the taking of the property of the Grigsby defendants without the due process of law, and a fraud and imposition upon this court and such was void as based upon any contract, judgment or decree of $294.56 as one arising wholly within the limits of the Territory of Oklahoma, and the fact that it did arise wholly within the limits of said Territory was not established on the trial of said cause No. 1524, and the judgment therein does not recite said account as so established and the cause of action as to said account of $294.56 did not as a fact nor is

such so alleged in the pleadings, to be a cause of action which arose wholly within the limits of Oklahoma Territory.

13th.

Published service notice was issued by Louis E. Pitts on the 8th day of January, 1895, and first published in the Oklahoma Leader on January 10th, 1895, commanding an appearance in suit No. 1524 on the 23rd day of February 1895 and such was not reasonable notice to the defendants; and it was not due process of law, and said notice was not published the legally required time, nor was said notice published for once a week for the time the law required before the 23rd day of February, 1895.

Wherefore, the published service notice did not give reasonable time and was void because not published the time require- by law, and the court was without jurisdiction to render the judgment of March 2nd, 1895, or to foreclose attachments or decree sale
101 of the property.

14th.

The published service notice as issued by Louis E. Pitts, clerk, on the 3rd day of June, 1895, with the first publication in the Guthrie Daily Leader on June 5th, 1895, commanding an appearance in suit No. 1524 on the 16th day of July, 1895, as to Lots 11 and 12 in Block 43, is not reasonable notice to these defendants, it was not due process of law; nor was said notice published the legally required time, nor was said notice published for once a week for the time the law requires before the 16th day of July, 1895, nor was it so published before the time that lots 11 and 12 in block 43 in East Guthrie were foreclosed upon or were sold.

15th.

That all the attachments, that all the published notices and all the orders and judgments, together with the orders of sale and the judgments approving said sales are void, because suit No. 1524 was for the whole of the Texas judgment and the property was sold to pay the whole of said debt by and through the action of the Southern Pine Lumber Company, then owned or dominated by T. L. L. Temple or such was so had and done by the individual action of the said T. L. L. Temple at a time when he was solvent and after he had paid off the Texas judgment and so done at a time when he, the said T. L. Temple, was liable as a co-partner for one-third of the debt due by the co-partnership known as the Union Mills Lumber Company composed of the two Grigsby- and the said T. L. L. Temple. And that said T. L. L. Temple was legally and equitably liable for one-third of the Texas judgment, and so liable for one-third of the account of $294.56 and without crediting his said one-third part of said indebtedness upon said judgment and upon said account he, the said T. L. L. Temple, either individually or as president of the Southern Pine Lumber Company, well knowing
102 all the facts, procured the filing of said suit, No. 1524, together with all the subsequent proceedings therein to be had

for an amount of money, of which he owed one-third on the face of the pleading, and said T. L. L. Temple falsely and fraudulently instituted suit No. 1524 for the purpose of attempting to divest the rights of D. J. and G. M. D. Grigsby in and to the property attached and sold in said suit, without the knowledge or consent of said American Exchange Bank, and these answering defendants and cross-petitioners now make the said Bank plaintiff in said suit a party to this action and ask this court to require it to answer and set up any claims it may have under said judgment and to this end defendants pray the court to cause a citation to issue to said Bank requiring it to answer herein.

16th.

That after rendition of said judgment, and after the issuance of orders of sale thereon, and after said orders had come to the hands of the sheriff of both Logan and Oklahoma Counties, the respective sheriffs of said counties did not give or publish for the time required by law, the legal notice of the sale of the property described in the judgment, or in the orders of sale, then in the hands of said sheriffs next before the sale days thereof.

17th.

The defendants D. J. Grigsby and G. M. D. Grigsby say that they, nor either of them, never had any notice, actual or constructive, of the pendency of said suit No. 1524. That they did not appear or answer in said suit, nor did they, or either of the-, ever authorize any one so to do for them, nor did they, or either of them, waive any notice, service or publication.

And said defendants further say that the Jefferson National Bank nor its officers or the trustee in said trust deed, F. E. Pente-
103 cost, or the receiver of said Jefferson National Bank, H. F. Auten, were never made parties to said suit No. 1524, or appeared in said or answered such suit or authorized any one so to do.

Defendants further say that at the time, December 17th, 1894, and ever afterwards the co-partnership of the Union Mills Lumber Company, composed as hereinbefore stated had been dissolved. And said co-partnership did not from the 17th day of February, 1892, owe the American Exchange Bank of St. Louis, Mo.; any money in or about said Texas judgment or said account.

18th.

These defendants deny that their co-defendants have any title to the property involved in this suit; and say that the mortgage sought to be foreclosed by W. B. Ward, plaintiff herein, is nor a cloud upon their title, because said deed of trust existed and was due and unpaid and properly registered and recorded; and said co-defendants had full notice and knowledge thereof, both actual and legal, before and at the time said suit No. 1524 was filed and before and at the time they purchased under the attachment and judgments in said suit.

That F. E. Pentecost, the trustee in said deed of trust, held the

legal right to the property in controversy, and during all the time of the pendency of said suit was an actual, *bona fide* citizen and resident of Logan County, Oklahoma Territory. And was so known to T. L. L. Temple. And said F. E. Pentecost could have been served with summons in said action in Logan County, but that he was not made a party to said suit No. 1524, nor was any service therein had upon him; that he did not waive such service, nor did he appear or answer in said suit, nor did the judgment adjudicate any matter therein as to said F. E. Pentecost.

19th.

That each and all of the affidavits made by G. S. Cunning-
104 ham and attached to the pleadings filed on the 17th of December, 1894, were made on the 14th day of November, 1894, long before the filing of said amendment, and said affidavits were expressly set aside, vacated and annulled in said suit No. 1524 by an order of the court, entered on the 17th day of December, 1894, in said suit. Said affidavit does not truly state the amount of the Texas judgment sued on, nor of the account sued on; same does not state the amount justly due, nor the amount plaintiff ought to recover. Said affidavit did not in any way refer back nor couple itself with any prior proceedings nor papers in cause No. 1524.

Wherefore, there was no affidavit to support the writs of attachment, which issued after the 17th day of December, 1894.

That the affidavit of G. S. Cunningham on Nov. 14th, 1894, for the issuance of said writs of attachment, states that the American Exchange Bank of St. Louis, Mo., was the plaintiff in said suit, when in truth and in fact said Bank had been paid the entire amount due it on the Texas judgment; and said Bank was not the owner or holder of said account of $294.56; said affidavit did not state that the open account arose or accrued wholly within the limits of the Territory of Oklahoma; said affidavit did not state that said Bank was either a citizen of, or not a citizen of the Territory of Oklahoma; and said affidavit sets out a total sum of money due, which had been paid by T. L. L. Temple, and of which he owed one-third as an original contracting obligator, as one of the co-partners of the Union Mills Lumber Company, and said Cunningham swears he was the attorney for said Bank when he was not, and he was the attorney in making said affidavit of Temple or Southern Pine Lumber Company in said suit No. 1524.

20th.

That the affidavit of said Cunningham made on the 14th day of
November, 1894, for the purpose of obtaining a publication
105 notice as against, the defendants, is void and defective in this it does not state, show or allege that the defendants were non-residents of the Territory of Oklahoma, or that with due diligence service could not be obtained upon said defendants within said Territory. And it does not show that the cause of action on the open account arose wholly within the limits of the Territory of Oklahoma, or that the suit was between a citizen of said Territory of

Oklahoma, or that the suit was between a citizen of said Territory and non-residents thereof.

21st.

That none of the affidavits made by said Cunningham, as attached to, and shown by the amendment of Dec. 17th, 1894, in anywise referred to nor was any of said affidavits coupled with or made parts of or any affidavits made in said cause No. 1524 prior to the 17th of December, 1894.

22nd.

That all affidavits for the attachments and affidavits for and notice of sale, as well as all orders in said cause No. 1524, were set aside by the judgment of the District Court of Logan County, Oklahoma Territory on the 17th day of December, 1894, and the only affidavits either for attachment or for service by publication were those made by said Cunningham on the 14th day of November, 1894, as such now appear attached to the amended plea filed December 17th, 1894.

23rd.

These defendants say, that on the 17th day of February, 1892, they were able to and would have paid T. L. L. Temple their pro rata share of the amount of money which he, as their co-partner, had paid to The American Exchange Bank of St. Louis, Mo. But that
106 said T. L. L. Temple concealed the fact of said payment and never requested or demanded any contribution from his alleged co-partners D. J. and G. M. D. Grigsby. But with the intent to cheat and defraud he the said T. L. L. Temple, individually or as president of the Southern Pine Lumber Company, filed or procured to be filed said suit No. 1524 and caused the proceedings to be had therein, as will appear by the papers and records of this court. And in one or the other capacity as aforesaid the said T. L. L. Temple either directing or through his legal adviser, J. D. Cook, employed and paid the attorneys who instituted and carried on the proceedings of said suit No. 1524. When in trust and in fact The American Exchange Bank of St. Louis, Mo., had nothing to do with said suit, was not the real plaintiff therein as to the entire amount sued for and specially had no interest in or knowledge of said account of $294.56 and said Bank never received one dollar of the purchase money for which said property was sold, either as to the Texas judgment or the $294.56 account. That said T. L. L. Temple paid the attorney who appeared for said American Exchange Bank of St. Louis, Mo., in said cause, he secured the cost in said suit and paid the same. And that each and all the acts of said T. L. L. Temple were either done in his individual capacity or as the president of the Southern Pine Lumber Company, incorporated, which company was either owned in whole or dominated in action by said T. L. L. Temple. That at all times after the said T. L. L. Temple paid said judgment on February 17th, 1892, the Southern Pine Lumber Company co-partnership, or the Southern Pine Lumber Company, incorporated, owned an undivided interest in the property here in controversy. And this undivided interest so had and owned by

Temple said Southern Pine Lumber Company and other than that of D. J. and G. M. D. Grigsby was also attached, foreclosed upon and sold, and bought by Temple or said Southern Pine Lumber
107 company, all of which was fraudulent and void in law and an imposition upon the District Court of Logan, Oklahoma, because the original debt was that of these defendants D. G. and G. M. D. Grigsby and Temple, the debt of the Southern Pine Lumber Company. And the property of the Southern Pine Lumber Company, as a co-partnership, was primarily liable for the debt, and was it liable for that one third portion which was due and payable from and by Temple and which was paid by T. L. L. Temple on the 17th day of February, 1892, and the said T. L. L. Temple either individually or as president of the Southern Pine Lumber Company in the institution of said suit No. 1524 was guilty of fraud and imposition in suing and attaching and seeking a foreclosure thereof and the sale of and buying that portion of the property the owned by the Southern Pine Lumber Company, co-partnership or incorporated, which Temple then owned or dominated. And his, the said T. L. L. Temple's action, either individually or as president of the Southern Pine Lumber Company was an imposition upon this court and done to cheat and defraud D. J. and G. M. D. Grigsby out of their undivided interest in and to said property here involved, through the use of a fictitious and fraudulent allegations of pleading, in whole and especially so as to the account of $294.56. And the action of said T. L. L. Temple in the capacities as aforesaid, was done without actual, legal or sufficient constructive notice to D. J. and G. M. D. Grigsby of the pendency of said suit No. 1524, or the subsequent proceedings therein, for the purpose of cheating and defrauding D. J. and G. M. D. Grigsby and to there by become the purchaser or beneficiary of said property or the sale money thereof, for less than two-thirds of the appraised value thereof, and for less than one-tenth of the actual value thereof and without due process of law. And that by the action of said T. L. L. Temple in the payment of Feb. 17th, 1892, he, being originally liable for the Texas judgment, said
108 payment being so made and as endorsed on the execution in the Texas case satisfied and cancelled, paid off and discharged said Texas judgment and any assignment or transfer thereof to any one is illegal and void and of no force and effect, either in Texas or here and that the entire proceedings in suit No. 1524 are for the reasons here set out and for each and all the other reasons appearing upon the face of the papers in said suit, and the orders, judgments and decrees and sales therein, illegal and void, and a fraud and imposition upon the District Court of Logan County, Oklahoma, and not due process of law. And the title set up by the several purchasers, under the proceedings in said Suit No. 1524 is void and is here prayed to be cancelled and held of no force and effect. And that the defendants D. J. and G. M. D. Grigsby have a direct interest and right to so plead and pray because, first, to the end that the property may be subjected to the payment of the note and deed of trust as pleaded by the plaintiff W. B. Ward; second, to the end that said property and the equity of D. G. and G. M. D. Grigsby

therein, if said deed of trust be foreclosed, shall be unclouded and unaffected by the illegal and void proceedings of said suit No. 1524 to the end that said property shall be sold unaffected by said void proceedings.

24th.

These defendants say that on August 6th, 1891, when the note for $884.90 was executed, that they executed another note for twice that amount. That T. L. L. Temple received the whole amount of the $884.90 note and it himself individually, and the said amount is due from said Temple primarially and not from the Union Lumber Mills Co., and that the other note for double that amount was endorsed by the Grigsbys, and they obtained the money on this last note, and that these defendants subsequently took up and paid the note which they endorsed and neither Temple nor the Union Lumber Mills paid any part of it. That it was a method they adopted to raise money using the Union Lumber Mill Co.
109 as a basis for giving the security by endorsement. That Temple took cash to the proportion of his interest in the Union Lumber Company and the Grigsbys did the same, and each agreed to take care of, pay and protect the paper signed by him individually, and the amount of the Dallas judgment was due from Temple indi- But if the Court should hold that the debt sued on was the just debt of the Union Lumber Mills Company, then these defendants are ready and willing to pay the proportion of said debt the court shall decided to be just and justly due from these defendants.

25th.

Defendants say that said Temple acting as the Southern Pine Lumber Company purchased said property at the sale made by the sheriff of Logan County and Oklahoma County, in Oklahoma Territory, and when he did so he was part owner of said property holding the same title these defendants held their interests, and if the court should hold said judgment and execution sales valid then these defendants are willing to pay the just proportion of the expense of said Temple in purchasing same but they say no part of said expense is just and legal, and said Temple cannot claim said land adverse to these defendants but he must hold same in trust for these defendants in proportion to the interest they held in the land before the sale.

26th.

These defendants say that if the court holds that it cannot annul the attachment and judgment at Guthrie and execution sale, then by reason of the fraudulent conduct and acts of said Temple the defendants say that said Temple should be decreed to hold said land in trust for the defendants in proportion to the interest they held before the sale. Defendants say that each of the other defendants bought the land they claim with full notice of the fraudulent
110 acts of T. L. L. Temple and with full notice of the illegality and irregularities of the proceedings in cause No. 1524 and

paid no value for said land and cannot hold same as an innocent purchaser for value.

These defendants D. J. Grigsby and G. M. D. Grigsby say that the title now set up and asserted by the other defendants is a cloud on the title of these answering defendants, wherefore they pray that the title held or claimed by each one of the other defendants to any portion of the land here in controversy be divested out of each one of them and vested in these defendants to the same extent and proportion that these defendants held it before said judgment and execution same in cause No. 1524.

Said property is described as follows: Lots 4, 5, 6, 7, and 21 in block 43, Guthrie Proper; lot 9, block 54, in Guthrie Proper; lot 15, block 51, in East Guthrie, lots 11 and 12 in block 43, East Guthrie, all in Logan County, Oklahoma Territory. That the Southern Pine Lumber Company, a corporation, and T. L. Temple, John D. De Bois, and his wife Hattie P. De Bois, Edwin L. Blincoe, G. W. R. Chinn and his wife Mrs. G. W. R. Chinn, each claim to own some interest in or a part of the land above described, superior to the rights of these defendants, J. D. Grigsby and G. M. D. Grigsby, the particulars of their claim these defendants, cannot say but they say that the claim of each of them is inferior and subordinate to the title of these defendants, that the Southern Pine Lumber Company and T. L. L. Temple are residents and citizens of Texarkana, Texas, John D. De Bois and wife Hattie De Bois and Edwin L. Blincoe are residents and citizens of Logan County, Oklahoma. G. W. R. Chinn and wife Mrs. G. W. R. Chinn are residents and citizens of Oklahoma County, Oklahoma Territory.

They pray for citation to be served on each of the defendants and on final hearing they pray that all title held by each and
111 every one of said defendants to any portion of the above described land be divested out of each of them and vested in D. J. Grigsby and G. M. D. Grigsby just as they held same prior to said suit No. 1524 and that all attachment orders judgments, and decrees and official sales made in said cause be annulled and held for naught and that the defendants holding thereunder be decreed to hold in trust for these answering defendants as before stated and they pray for general relief and for costs.

F. H. PENDERGRAST,
Attorney for D. J. & G. M. D. Grigsby.

Endorsed on back: We hereby consent to filing this answer at this time Buckner & Sons, attorneys for plaintiff, W. B. Ward, Fred M. Elkin, Attorneys for So. Pine Lumber Co., and G. W. R. Chinn and Mrs. G. W. R. Chinn, defendants.

No. 3011. W. B. Ward *vs.* F. E. Pentecost, Southern Pine Lumber Co. *et al.* Answer and Cross-bill of Grigsby Bros. Logan County. Filed Oct. 29th, 1902. Thos. A. Neal, Clerk District Court. F. H. Prendegast, Att'y, Marshall, Texas.

112 And, afterwards, to-wit, on the 20th day of November, 1902, the defendants D. J. Grigsby and G. M. D. Grigsby,

did file an affidavit for service by publication in said action, which instrument with the endorsements thereon, is in words and figures as follows, to-wit:

In the District Court of Logan County, Oklahoma Territory.

Case No. 3011.

W. B. WARD, Plaintiff,

vs.

F. E. PENTECOST, Trustee; THE SOUTHERN PINE LUMBER COMPANY, THE AMERICAN EXCHANGE BANK, and All Others Defendants in Case No. 3011, Defendants.

Affidavit for Service by Publication.

STATE OF TEXAS, *County of Harrison*, ss:

F. H. Prendegast, being first duly sworn on his oath, deposes and says: That he is the attorney for the defendants D. J. and G. M. D. Grigsby in the above entitled cause; That said action is brought to recover the sum of $11082.50 due on promissory note and to foreclose a trust deed on certain real estate more fully and particularly described in the petition of plaintiff herein and the answer and cross petition of these defendants represented by me which description is here referred to and made a part of this affidavit. That the defendants D. J. and G. M. D. Grigsby have filed in this court their joint answer and cross-petition to the petition filed by plaintiff and by said answer and cross petition these defendants have made
113 The American Exchange Bank a corporation of St. Louis, in the State of Missouri, and existing under and by virtue of the laws of the State of Missouri, a party defendant to this action, for the reason said Bank is a necessary party to this action because the judgment and proceedings attacked in this action *was* taken in the name of said Bank as plaintiff and against these answering defendants. That the cause of action involved herein is one of those cases in which service by publication is authorized by the laws of the Territory of Oklahoma. That the said defendant The American Exchange Bank of St. Louis, Missouri, is a foreign corporation and is exclusively located and doing business in the City of St. Louis, in the State of Missouri and does not do business in Oklahoma Territory and has no agents, attorneys or representation in the Territory of Oklahoma, upon whom service of summons can be made. That service of summons cannot be made on said defendant in the Territory of Oklahoma and these answering defendants and cross-petitioners with due diligence are unable to make service of summons on said defendant in the Territory of Oklahoma. That this action is embraced in general section 3950 Statutes of the Territory of Oklahoma of the year A. D. 1893.

F. H. PRENDEGAST.

Subscribed and sworn to before me this 19th day of November, A. D. 1902.

[SEAL.]

MARIM TUMEY,
Notary Public, Harrison County, Texas.

Endorsed on back: No. 3011. W. B. Ward *vs.* Southern Pine L. Co. *et al.* Affidavit for service by publication on Cross-
114 petition of Grigsby. Filed Nov. 20th, 1902. Thos. A. Neal, Clerk District Court. F. H. Prendegast, Marshall, Texas, Att'y.

And afterwards, to-wit, on the 24th day of November, 1902, the defendants, G. M. D. Grigsby and D. J. Grigsby did file in said action, leave of court having been first had and obtained, an amendment to their answer and cross-petition therein, which instrument, with the endorsements thereon is in words and figures as follows, to-wit:

In the District Court of Logan County, Oklahoma Territory.

W. B. WARD, Plaintiff,
vs.
F. E. PENTECOST ET AL., Defendants.

Now comes G. M. D. Grigsby and D. J. Grigsby, two of the defendants in the above cause, and leave of court being had and obtained, files this the amendment to their answer heretofore filed and pray this be taken in addition to said answer.

These defendants show that heretofore on August the 6th, 1901, the Union Mills Lumber Company, a partnership composed of these two defendants and T. L. L. Temple, gave its note to the American Exchange Bank for the sum of $894.90, payable in ninety days. Said note was endorsed by the Southern Pine Lumber Company, a co-partnership composed of T. L. Temple and Ben. Whittaker, and also endorsed by T. L. L. Temple.

115 That the American Exchange Bank filed suit on said note, and recovered judgment in the District Court of Dallas County, Texas, in January 1892, and on February the 17th, 1892, execution was issued on said judgment to Bowie County, Texas, and the same was paid in full by T. L. L. Temple.

That about December the 17th, 1894, T. L. L. Temple filed suit at Guthrie, in Logan County, in Territory of Oklahoma, in the name of the American Exchange Bank as plaintiffs and the following persons as defendants: T. L. L. Temple and Ben Whittaker, partners as the Southern Pine Lumber Company, the Southern Pine Lumber Company, a corporation, and D. J. Grigsby and G. M. D. Grigsby and T. L. L. Temple, partners under the name of Union Mills Lumber Company, praying judgment in the Guthrie suit for the full amount of the judgment obtained at Dallas, Texas, and also praying judgment for $294.56 on an open account alleged to be due from the Union Mills Lumber Company to the American Exchange Bank.

That pending said suit, T. L. L. Temple, acting in the name of the American Exchange Bank, sued out an attachment against the defendants in said cause as being non-residents of the Territory of Oklahoma, and attached the following real estate in Oklahoma Territory, the following described property:

Lots 11 and 12, block 43, East Guthrie. Lots 4, 5, 6, 7, and 21, in block 43, Guthrie Proper. Lot 9, in block 54, Guthrie Proper. Lot 15, in block 51, East Guthrie. Lots 17, 18, 19, 20, 21, in block 60, in Oklahoma City.

In July, 1895, judgment was rendered in said cause in Guthrie, Oklahoma Territory, condemning said property so attached to be sold to satisfy the judgment and account sued on. The same was sold by the Sheriff and purchased by T. L. L. Temple for the nominal consideration of about $200.00, being less than one-tenth of its real value. That the property is now claimed by T. L. L. Temple,
116 The Southern Pine Lumber Company, a corporation, John D. De Bois, Hattie De Bois, his wife, Edwin N. Blinco, G. W. R. Chinn and his wife Mrs. Chinn. The property is also claimed adversely to the above parties by G. M. D. Grigsby and J. D. Grigsby. And W. B. Ward also claims the mortgage lien on said property given by these defendants to secure a note of $5,000, and interest, and has filed suit in the District Court at Guthrie, Oklahoma Territory to foreclose said lien and has made all of the above named parties defendants.

And these two defendants have filed a cross bill to said foreclosure suit praying the court to set aside and annul the judgment, attachment and sheriff sale made in said cause No. 1524, in the District Court at Guthrie, Oklahoma Territory, because these defendants were only cited in said cause by publication and they had no notice of the pendency of said suit until long after the judgment was rendered and no proper proceedings were had to sustain the attachment nor proceedings to sustain the citement by publication, and also that said judgment and citation by publication, judgment and sale were void for that reason, and also praying to have said judgment, attachment and sale set aside because of the fraud in T. L. L. Temple in filing and prosecuting said suit and in obtaining said attachment, judgment and sale.

These defendants now pray that said American Exchange Bank be cited to appear and show cause why the judgment, attachment and sale should not be annulled as above set forth.

F. J. PRENDEGAST,
Attorney for D. J. and G. M. D. Grigsby, Defendants.

Endorsed On Back: No. 3011. W. B. Ward, pl'ff, *vs.* F. E. Pentecost, *et al.* Amendment to Answer and Cross-petition of defendants D. J. and G. M. D. Grigsby. Filed Nov. 24, 1902. Thos. A. Neal, Clerk District Court. F. H. Prendegast, Att'y Marshall, Texas.

117 And, afterwards, to-wit on the 9th day of March, 1903, the defendants, the Southern Pine Lumber Company, and the other defendants to said action, mentioned in the joint answer

filed herein of date August 4th, 1900, did, leave of court being first had and obtained, file their demurrer to the answer of the defendants G. M. D. Grigsby and D. J. Grigsby, which pleading, with the endorsements thereon, is in words and figures as follows, to-wit:

In the District Court of Logan County, Oklahoma.

W. B. WARD, Plaintiff,
vs.
THE SOUTHERN PINE LUMBER COMPANY, a Corporation, ET AL., Defendants.

Demurrer.

Comes the Southern Pine Lumber Company and other defendants to this cause, save G. M. D. Grigsby and D. J. Grigsby, answering defendants asking affirmative relief.

And Demurr*ers* to so much of the answer of said defendants, G. M. D. Grigsby as seeks to attack, either direct or collaterally a former judgment of this court, No. 1524, styled American Exchange Bank *vs.* Southern Pine Lumber Company, *et al.*

1st. Cause: Said answer and petition for affirmative relief does not state facts sufficient to constitute a cause of action.

2nd. cause. Said defendants cannot attack collaterally the affirmative judgment of this court.

3rd. cause. Said answer and petition for affirmative relief does not conform to the rules required for bills for review or bills in the nature of a bill for a review.

118 4th. cause. Said petition does not set up sufficient equities to entitle them to be heard either in this cause or in a decree Bill for Review.

5th. cause. The petition states such facts as to admit laches that would amount to estoppel.

6th. cause. Said pleadings are in all things vague, indefinite, lacking in equities and too irregular to be heard.

J. D. COOK,
For Defendant in Cross-bill.

Endorsed on back: No. 3011. W. B. Ward, *vs.* Southern Pine Lumber Co. *et al.* Demurrer. Filed March 9th, 1903, T. A. Neal *Deputy*. By V. S. Nelson, Deputy.

119 And afterwards, to-wit, on the 10th day of March, 1903, the said defendants, the Southern Pine Lumber Company, T. L. L. Temple, G. W. R. Chinn, and Mrs. G. W. R. Chinn, his wife, did, with leave of court first had and obtained, file their answer to the cross-bill and answer and counter-claim of D. J. Grigsby and G. M. D. Grigsby herein, which answer, with the endorsements thereon is in words and figures as follows, to-wit:

In the District Court of the Territory of Oklahoma in and for the First Judicial District, County of Logan.

W. B. WARD, Plaintiff,

vs.

E. F. PENTECOST, SOUTHERN PINE LUMBER CO., ET AL., Defendants.

Answer.

For answer to the cross-bill, answer and counterclaim of D. J. Grigsby and G. M. D. Grigsby, come now the defendant- in the above entitled action and state:

That they and each of them, severally deny each and every allegation in said cross bill, answer and counterclaim contained.

Wherefore, defendants and each of them ask judgment for cost and for all other proper relief.

H. S. CUNNINGHAM.
J. D. COOK.

Endorsed on back: Docket No. 3011. W. B. Ward, Plaintiff, *vs.* E. F. Pentecost, *et al.* Defendants. Answer to cross bill. Filed Mar. 10th, 1903. Thos. A. Neal, Clerk District Court.

120 And afterwards, to-wit, on the 12th day of March, 1903, the cross-petitioners, D. J. Grigsby and G. M. D. Grigsby, did file in said action a proof of publication therein, which instrument, with the endorsement thereon is in words and figures as follows, to-wit:

Proof of Publication.

TERRITORY OF OKLAHOMA, *Logan County, ss:*

C. S. Brengle, of lawful age, being first duly sworn, deposeth and sayeth, that he is Business Manager of the Guthrie Leader, a newspaper printed and published in Logan County, Territory of Oklahoma; that said newspaper has been continuously published for more than fifty-two weeks last past, and that a notice of which a true copy is hereto attached, was published in the regular and entire issue of each number of said paper for 5 times the first publication being made as aforesaid on the 24th day of Nov. A. D. 1902, and the last on the 18th day of Dec. A. D. 1902.

(Signed) C. S. BRENGLE.

Subscribed and sworn to before me this 10th day of Mch. 1903.

A. A. MEACHAM,
Notary Public.

[SEAL.]

My Commission expires May 27th, 1905.

Printers' fees, $22.00

Endorsed on back: No. 3011. Ward *vs.* So. Pine L. Co. *et al.* Filed March 12th, 1903. T. A. Neal, Clerk By C. S. Nelson, Deputy.

121 In the District Court of Logan County, Oklahoma Territory.

Cause No. 3011.

W. B. WARD, Plaintiff,

vs.

THE SOUTHERN PINE LUMBER CO., THE AMERICAN EXCHANGE BANK OF ST. LOUIS, MO., ET AL., Defendants.

Notice for Publication.

To the American Exchange Bank, a corporation organized and existing under the laws of the state of Missouri, defendants in the above styled cause, pending for trial in the above entitled court:

You are hereby notified that the defendants, D. J. and G. M. D. Grigsby, defendants in the above cause, have filed their answer and cross-petition to the petition in the above entitled cause of the plaintiff, in said court, by which answer and cross-petition, these said defendants, Grigsby make you the said American Exchange Bank, a party defendant in said action, and you are further notified that the petition of the plaintiff, W. B. Ward, and the answer and cross-petition of defendants Grigsby, are each respectively proceedings to quiet title to real estate hereinafter described, and to annul and set aside the judgment and all proceedings had and done in case No. 1524 being a case tried and determined in the above entitled court, wherein the American Exchange Bank, a corporation organized under the law of the state of Missouri, was plaintiff, and T. L. L. Temple and Ben Whittaker, partners as the Southern Pine Lumber Company, The Southern Pine Lumber Company, a corporation organized under the laws of the state of Arkansas, and D. J. Grigsby, G. M. D. Grigsby, and T. L. L. Temple partners under the firm name and style of the Union Mills Lumber Company, were defendants in which cause judgment was rendered in favor of plaintiff on
122 March 2nd, A. D. 1895, foreclosing attachment liens and ordering the property hereinafter described sold to satisfy said judgment, which was done, and you are further notified that the purpose of this proceeding is to declare said judgment fraudulent and void and to recover the property sold there under and for other equitable relief and you will take notice that unless you appear in said court and answer the petition of plaintiff and cross-petition of defendants Grigsby, now on file in said court on or before the 7th day of January, A. D. 1903, said several pleadings will be taken as true and judgment rendered against you annulling said judgment in case No. 1524, quieting title to said property, in these defendants and cross-petitions and for costs and all proper equitable relief. The real estate involved is described as follows, to-wit:

An undivided 4-5 interest in lots No. 4, 5, 6, 7, and 24, in block No. 43, City of Guthrie Proper; an undivided 4-5 interest in lot No. 9, in block No. 54, Guthrie Proper, and lot No. 15, in block No.

51 in East Guthrie, all in Logan County, Oklahoma Territory; also an undivided 4-5 interest in lots No. 17, 18, 19, 20 and 21, in block No. 60, in Oklahoma City, Oklahoma Territory, also lots No. 11 and 12, in block 43, East Guthrie, Logan County, Oklahoma Territory, together with other real estate situated in said city, county and territory.

Dated this 24th day of November, A. D. 1902.

D. J. & G. M. D. GRIGSBY,
Cross-Petitioners.

[SEAL.]

By F. H. PRENDERGAST,
Their Attorney.

Attest,
T. A. NEAL,
Clerk District Court,
Logan County, Oklahoma Territory.
By ANNA QUINN, *Deputy.*

123 And afterwards, to wit, on the 16th day of March, 1903, counsel for D. J. Grigsby and G. M. D. Grigsby did file in said cause and action, certain documents attached together, entitled Motion to open case, which instrument, with the endorsements thereon, is in words and figures as follows, to-wit:

In the District Court of Logan County, Oklahoma Territory.

No. 3011.

W. B. WARD
vs.
SOUTHERN PINE LUMBER CO., D. J. & G. M. D. GRIGSBY and Others.

F. H. Prendegast, comes and says he is the attorney for D. J. and G. M. D. Grigsby defendants in the above cause and plaintiffs in the cross bill. Affiant fears that the court has misconstrued the facts of the case as to the Status of the Grigsbys on the question of laches or long delay. The Grigsbys knew that a judgment had been rendered against them at Guthrie as they state in their depositions. But affiant does not believe that they knew anything of the fact that Temple had paid the Dallas judgment or of the fraud of Temple in procuring that judgment at Guthrie until sometime about October 1901. Affiant on his way home from Guthrie on March 13, 1903, met Mr. D. J. Grigsby and talked the matter over with him and attaches hereto his affidavit. Affiant remembers that Mr. M. R. Greer was employed as the attorney for Grigsbys to look into the judgment at Guthrie. Affiant was not then employed in the case but Mr. Greer often talked with him about the case, and affiant now remembers that said Greer came to affiant along November 1901 and told him he had learned that Temple had paid the Dallas judgment before the suit was filed at Guthrie. Mr. Greer

died in March, 1902, and after that affiant was employed as Grigsbys' attorney.

124 Affiant has examined the letters of Mr. Greer and finds letters from American Exchange Bank and McCormick & Spence their attorneys, in the Dallas suit, he attaches them to show that Mr. —— obtained through them in November, 1901, the information that Temple had paid the judgment at Dallas. G. M. D. Grigsby is now at Parsons, Kansas, or Muskogee, I. T. Affiant believes he can prove by G. M. D. Grigsby that he knew nothing of the fraud of Temple in procuring the judgment at Guthrie until November, 1901. Affiant says he will procure the affidavit of G. M. D. Grigsby and attach

Wherefore he prays that the court reopen the cause and permit the Grigsbys to testify on the above points. He will file their affidavits or take their depositions on commission or any way the court prefers.

Affiant thinks it would be unjust for the case to be decided against the Grigsbys on the ground of long delay under the above state of the facts when no such defense was pleaded.

(Signed) F. H. PRENDERGAST.

Sworn to and subscribed before me this March 14th, 1903.
Witness my hand and official seal.

[SEAL.] BEN. S. POPE,
Notary Public in and for Harrison Co., Texas.

125 In the District Court of Logan County, Oklahoma.

No. 3011.

W. B. WARD
vs.
SOUTHERN PINE LUMBER COMPANY and D. J. & G. M. D. GRIGSBY.

Comes D. J. Grigsby one of the defendants in above cause and plaintiff in cross bill and on oath says

That several years ago he learned from his brother, G. M. D. Grigsby, that a judgment had been rendered against us at Guthrie, Oklahoma, as stated in my deposition in this case. Sometime after that and after W. B. Ward had filed this present suit, G. M. D. Grigsby concluded he would have the matter of the judgment at Guthrie investigated to see if we had any rights under it. Affiant had supposed all the time that it was a judgment on one of the old debts against Grigsby Bros., a copartnership. G. M. D. Grigsby employed M. R. Greer, an attorney, at Marshall, Texas, to investigate the judgment at Guthrie and see if we had any defense to it. This employment, I think, was sometime early in the year 1901. Sometime after Mr. Greer was employed and I think it was about November, A. D. 1901, Mr. Greer came to me and informed me that he had learned that the judgment at Guthrie was based on a judgment at Dallas, Texas, on a note given by the Union Lumber Mills Com-

pany, and that Mr. T. L. L. Temple had paid the judgment in full before the suit was filed at Guthrie. This was the first information I had that Temple had paid the judgment or that there was anything irregular or improper in the judgment at Guthrie. We then had Mr. Greer prepare the defense to the judgment. Mr. Greer died in March, 1902, and after that we employed Mr. F. H. Prendegast to make the defense. I am satisfied that G. M. D. Grigsby knew nothing of the fraud in procuring the judgment — Guthrie or that Temple had paid the Dallas Judgment, until he was in-
126 formed by Mr. Greer, sometime in the fall of 1901. Temple had never mentioned to this affiant the fact that he had paid the Dallas Judgment.

D. J. GRIGSBY.

Sworn to and subscribed before me this March 14th, 1903.
Given under my hand and seal of office.
[SEAL.]
BEN S. POPE,
Notary Public in and for Harrison Co., Texas.

127

St. Louis, *Nov.* 23, 1901.

Messrs. McCormick & Spence, Dallas, Texas.

GENTLEMEN: In reply to your favor of the 21st will say, we have never authorized any one to bring suit in our name. If so, it has passed out of my mind, but I am positive we have never given this authority, because before giving it we would certainly have written you. I enclose papers as requested.

We had a letter some time back from some one in Oklahoma asking about property down there, but have never had any explanation. I wish you would look up the matter and is there is anything in — for us, let me hear from you.

Yours truly,
(Signed) WALKER HILL, *President.*

128 McCormick & Spence, Attorneys & Counsellors at Law,
Dallas, Texas.

NOVEMBER 25, 1901.

Hon. M. R. Greer, Attorney, Marshall, Texas.

DEAR SIR: We are today in receipt of a letter from Mr. Walker Hill President of the American Exchange Bank of St. Louis, in reply to our letter written him at your request, and in which letter we set forth fully and clearly the matters as requested in yours to us of the 13th instant. We enclose Mr. Hill's letter and we return also the copy of the pleadings in the Oklahoma suit which you sent to us. We think that you may safely conclude/ that those legal proceedings in Oklahoma were taken absolutely without the Bank's consent knowledge or authority.

At least so far as we have any knowledge, those proceedings were utterly without authority from the Bank.

The writer talked with you yesterday evening over telephone and

hopes that the enclosures will reach you in time to be of service. Let us serve you in other matters at any time.

Respectfully yours, McCORMICK & SPENCE.

W. S.
Enc.

129 MARSHALL, TEXAS.

McCormick & Spence, Att'ys, Dallas, Texas.

DEAR SIRS: Mr. Grigsby will hand you papers, case No. 9659, 11th Dist. Ct. Examine petition, pencil copy judgment, execution and ret. and we ask.

1. Have you note sued on; it is not in papers. If you have will you permit Grigsby to file it so I can get copy.

Answer. The note was filed. We do not know where it is.

2. Did you get money as deposited in Texarkana Bank, if so, did you transfer or assign the judgment to any one? If so, who and when? If you have copy of transfer give me copy.

Answer. We sent money to our client, of course. Afterward at request of S. P. L. Co. we sent them copy, etc.

In remitting did you say to Am. Ex. Bk St. Louis, that you or it was to transfer or assign judgment, or did you and the Bank regard it as a payment satisfaction, the end and all of the judgment.

Answer. The Bank regarded matter settled.

3. Did you as Att'y Am. Ex. Bk St. Louis, empower or authorize any one in pl'ff's name to sue on or locally act with judgment in Oklahoma or any other place?

Answer. Such authority was given by Statute. See principal and surety.

4. Did Am. Ex. Bk St. Louis ever notify you, and if so, how, that it had transferred or assigned judgment to any one. Answer. No.

130 5. Did you ever bring but this one suit for Am. Ex. Bk of St. Louis, in Dallas, Co., as against these particular def'ts. Answer: No.

6. In ack. receipt of money of you as it possibly did, did the Am. Ex. Bk. of St. Louis, regard it as a paid and discharged or was it to be kept alive for further transfer or use by any one in its name?

Answer. This was governed only by Statute. S. P. Ld. Co. claimed to have been surety only.

7. Please go carefully through your data, letters & etc. and add anything you can, showing a transfer or not or the employment of attys. to sue on this judgment in your client's name or authority? Do any act by or thro it?

Answer. No authority save that given to a Surety by Statute.

Please write reply attaching to this.

Yours very truly, M. R. GEER.

Endorsed on back of motion: No. 3011. Ward *et* So. Pine Lumber Co., *et al* Motion to open case. Filed March 16th, 1903. T. A. Neal, Clerk. By C. S. Nelson, Deputy. F. H. Prendegast.

131 And, on the 21st day of January, 1901, the plaintiff dismissed this cause, as to the defendant Hattie P. De Bois, only striking her name from the petition as a defendant.

And, afterwards, to-wit, on the — day of March, 1903, before the said action is called for trial, the said action is duly dismissed in open Court as to, and against, the defendant, Charles Griswold, and the said dismissal is duly entered of record on the journal of said Court.

And, afterwards, on the 10 day of March, 1903, the said action came on regularly for trial, the plaintiff appearing by his attorney, George W. Buckner, and the defendants, The Southern Pine Lumber Company, T. L. L. Temple, and G. W. R. Chinn, and Mrs. G. W. R. Chinn, his wife, appearing by their attorneys, J. D. Cook, and the defendants Grigsby Brothers, appearing by their attorney, F. H. Prendergast.

And at trial of said action, the said cause was tried to the court without the intervention of a jury. The parties appearing, introduced their evidence, and certain orders and rulings were made at said trial, and certain objections made and exceptions saved.

All of said evidence so introduced at said trial in said action and the objections made and exceptions saved and the orders and rulings of the court, are in words and figures as follows, to-wit:

132 In the District Court of Logan —, Oklahoma Territory.

W. B. Ward, Plaintiff,

vs.

The Southern Pine Lumber Company, a Corporation, et al., Defendants.

Transcript of Evidence.

Trial at February Term, 1903, of the above entitled Court, before Hon. John H. Burford, Judge, without the intervention of a jury.

Appearances.

For the Plaintiff, George W. Buckner.

For the Defendant, Southern Pine Lumber Company, T. L. L. Temple and Chinn, J. D. Cook and Chinn, John H. Cotteral.

For the Defendants, Grigsby Brothers, F. H. Prendergast.

The defendants, the Southern Pine Lumber Company and Chinn and Chinn, offer in evidence the deposition of H. F. Auten, which is as follows:

H. F. Auten, a witness called on behalf of the defendants, being duly sworn, deposes and says:

Q. State your name, age residence and occupation.

A. My name is H. F. Auten, age 39 years; residence Little Rock, Ark.; occupation lawer by profession.

Q. Do you know W. B. Ward, the plaintiff in this action?
A. I do.

Q. Do you know the parties defendant? (Reading them.)
133 A. I am acquainted with the Grigsby Brothers, and with Mr. Whittaker. I have no acquaintance with any of the other defendants. As to the National Bank of Jefferson, Texas, it has been insolvent since 1896, and I was Receiver of the same, under appointment of the Comptroller of the Currency from June 25th, 1898, to July 1st, 1900.

Q. While acting as Receiver for said bank, did you have any obligations of Grigsby Bros., composed of G. D. M. Grigsby and D. J. Grigsby, consisting of a note or notes and securities, in the way of mortgage on property in the Territory of Oklahoma?

A. As Receiver of said bank, I held against the Grigsby Bros. claim amounting to something over $5000. These claims were secured by chattel mortgage on grading outfit, and deed of trust on property in Oklahoma Territory, and, I believe, some stock as collateral.

Q. Examine copy of instrument tendered you as deed of trust, and see if that is a copy of the original instrument held by you?

A. This is a copy. It was in my hands as Receiver, together with the original note attached thereto for $5000 and interest accumulated thereon. This note was executed June 11th, 1891, due ninety days after date, bearing 10% interest from maturity and signed by Grigsby Bros.

Q. Has that note been paid?

Objected to as incompetent, irrelevant and immaterial—no ruling.

A. This note was compromised and settled. Grigsby Bros. were supposed to be insolvent, or, at least, that was the report which I had of them. They sent an attorney from Dallas, Texas, whose name I don't now recall, to Little Rock, and one of the Grigsby
134 Bros. come with him; and made me a proposition to pay $1000 in settlement of this claim. Afterwards, and before this settlement was concluded, I learned for the first time of the securities held as collateral thereto, and then I refused to accept the $1000. Afterwards, Mr. Grigsby renewed his offer, or rather offered me $1500 in settlement. This I declined, but told him that if he would pay $2000 I would recommend its acceptance to the Comptroller of the Currency. He accepted this proposition, and sent me check of Grigsby Bros., or I believe it was the check of the Grigsby Construction Co., which is composed of the Grigsby Bros., for $2000, and the claim was settled in that way.

Q. I see you assigned in blank copy of the mortgage held by you as security.

Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in this case. No ruling.

A. Yes. At the time when they sent me the draft, they asked me to return to them the securities which I held, and to assign or to endorse upon the copy of the deed of trust which I held an assignment in blank, which I did.

Q. Previous to that assignment, had the note been paid?

A. It had. It was paid when I received the check for $2000.

Q. The check was honored?

A. It was.

Q. Have you any correspondence with Grigsby Bros., or either of them relative to this settlement, this transaction?

A. I have. The first letter I find is one dated November 20th, 1898, introducing Mr. T. K. Marsalis to me, saying he was authorized to negotiate with me concerning this matter. This was the gentleman who was with Mr. Grigsby in this city when Mr. Grigsby
135 made me the proposition to pay $1000.

Q. Will you attach a copy of that letter as Exhibit A to your deposition?

A. I will. (A copy of said letter is hereto attached as part of this deposition, marked Exhibit A.)

November 23rd, they were in Little Rock, as on that day while here Mr. Grigsby made me the proposition to pay the $1000, which I find I have on file with my letters. On that day, Mr. Marsalis, after considerable consultation, asked me what I would agree to recommend to the Comptroller, and I told him I would recommend $1000. He took that proposition from me to Mr. Grigsby, who was at the hotel, and this letter which I have in my hands now is Grigsby's reply accepting the proposition.

Q. Will you attach a copy of that letter as Exhibit B to your deposition?

A. Yes. (A copy of said letter is hereto attached as part of this deposition, marked Exhibit B.)

A. I hardly know which letter comes next, but I find here several letters from the Grigsby Bros., or one or the other of them. After the offer of $1000 was declined, I received a letter or telegram I don't remember which, from Jefferson, Texas, from Mr. T. D. Rowell stating that Mr. Grigsby was present and would pay $1500 to make the settlement. I wired back declining to accept that proposition, but told them I would accept $2000.

Q. Have you a copy of that telegram?

A. I have in my telegram book. (Reading:)

"DECEMBER 8TH, 1898.

T. D. Rowell, Jefferson, Tex.

I will accept two thousand dollars for Grigsby and Marsalis claims.

H. F. AUTEN."

136 Q. State what position Mr. Rowell occupied there?

Objected to as incompetent, irrelevant and immaterial. No ruling.

A. Mr. Rowell was the attorney for a majority of the creditors of the National Bank of Jefferson, Texas, and, representing the creditors, was anxious to collect as much on all of the claims as possible, and appeared for them in various matters. In reply to

that telegram, I received one which I hold in my hands, of the same date, as follows:

JEFFERSON, TEX., *Dec. 8th*, 1898.

H. F. Auten, Little Rock, Ark.

Grigsby accepts your proposition of this date and has left check for two thousand dollars with me to close deal.

T. D. ROWELL."

Q. That is the check you referred to as having received and which was paid?

A. It is.

Q. Have you any letters showing a receipt from Grigsby Bros. for the delivery of those papers?

A. I have. I have a receipt, signed by G. D. M. Grigsby, dated December 23rd, 1898, which reads as follows: "Received of T. D. Rowell, attorney for H. F. Auten, Receiver of the National Bank of Jefferson, 57 shares of stock in the Interstate National Bank of Texarkana, Tex., as evidenced by certificates nos. 161, 162, 179, 180 and 190, also two notes of T. L. Marsalis for $500 each, and a certain mortgage on a lot of mules, scrapers, etc., said to be in Louisiana, and also an assignment of the bank's interest in the deed of trust on the Guthrie and Oklahoma property." I find I have
137 a letter also, which appears to be dated January 3rd, 1898, but should have been dated January 3rd, 1899, as it was in the course of this correspondence, written from Longview, Tex., and signed by G. D. M. Grigsby, which reads as follows:

"H. F. Auten, Esq., Receiver of the National Bank of Jefferson, Tex. Little Rock, Ark.

DEAR SIR: Yours to T. D. Rowell enclosing stocks, notes, etc., received. Grigsby Bros. were endorsers on some one thousand and forty dollars of Clark & Boyce paper, which is now in judgment at Dallas. I wish you would please have T. D. Rowell, your attorney, cancel endorsement as to Grigsby Bros. Please answer at Jefferson, Tex.

Yours truly, G. D. M. GRIGSBY

I have another letter of date February 27th, 1899, written from Dallas, Tex., signed by G. D. M. Grigsby, as follows:

"DALLAS, TEX., *February* 27, '99.

H. F. Auten, Esq., Little Rock, Ark.

MY DEAR SIR: Among the assets that were turned over to the Jefferson National Bank as collateral to the notes I settled with you for were two judgments in favor of the Bankers & Merchants National Bank of Dallas, one of the judgments against T. L. Marsalis, and the other against the Dallas Land & Loan Co. aggregating something like $8,000. These judgments were assigned to the Jefferson National Bank in the name of the Bankers & Merchants

National Bank of Dallas. They were collateral to my notes.
138 Since I have settled with you, I wish you would transfer the judgments back to the Grigsby Construction Co., either by blank endorsement or regular assignment, and deliver them to W. L. Hall, attorney at law of Dallas, who will present this letter to you. Give this your immediate attention, and you will greatly oblige.

Yours very truly, G. D. M. GRIGSBY."

Q. As Receiver, what was the amount of obligations you held against Grigsby Bros. at the time this settlement was made?

Objected to as incompetent, irrelevent and immaterial—no ruling.

A. It was this $5000 note and the interest thereon. Grigsby Bros. afterwards claimed that their endorsements on the Clark & Boyer paper was also to have been cancelled, but that wasn't in the agreement, and that was not done. They afterwards conceded that that wasn't to have been settled with this matter.

Q. Did you know anybody in this transaction save Grigsby Bros. in the settlement?

A. No. I talked with one of the Grigsby Bros., about this matter two or three times subsequent to the settlement, but there was never any claim made by him that it was anything but a settlement between himself and myself, or between themselves as a firm and myself.

Q. This suit was filed August 4th, 1900. Have you had any correspondence with them since that time, or either of them?

A. I Think not. I don't believe I have seen either of them since that time.

Q. Did you know the plaintiff in this action, W. B. Ward, in connection with this transaction in any way?

139 A. I did not.

Q. Can you recall how you came to make the assignment in blank? Was it at Grigsby Bros.' request?

A. Mr. Rowell, to whom Mr. Grigsby went at Jefferson, and through whom he transmitted to me his offer to pay $1500, and later on his acceptance of my $2000 offer, wrote me instructions, saying that Mr. Grigsby desired that I make this assignment in blank, and I did so in accordance with his request, and forwarded the papers to him for Mr. Grigsby, and they were by him turned over to Grigsby, as shown by his receipt.

Q. Has the affairs of the Jefferson National Bank been closed?

A. My receivership ended June 30th, 1900. There was an assessment of 3% levied upon the stockholders in that bank, but a new Receiver, J. Frank Aldrich, of Washington, D. C., was appointed to collect in that small amount.

Cross-examination:

Q. You say you mailed this deed and note to Mr. Rowell?

A. I mailed all the collateral, together with the note, to Mr. Rowell for Mr. Grigsby.

Q. Mr. Rowell mailed you the check in payment of the obligation of Grigsby Bros.

A. No. Mr. Rowell mailed me the check in advance. When I telegraphed to him that I would accept $2000, Mr. Rowell wired back that Grigsby accepted the proposition, and had left a check of $2000 with him for me to close the deal. Mr. Rowell mailed me that check at once and I had it cashed. It was probably ten days before I mailed the papers to them, because it required time for me to write the Comptroller at Washington to get his approval, and after his approval was obtained, I then had to draw an application to the U. S. Court of Texas, and mail it to Judge
110 Bryant and have him sign the order and enter it upon the records, and after this was done then I mailed the papers and collateral to Rowell for Grigsby.

Q. You say you never had any conversation or talk with W. B. Ward concerning this transaction?

A. No.

Q. Did you ever have with anybody representing him?

A. No.

Q. Do you know who furnished the money with which you claim this $5000 note had been settled and paid?

A. No. On the day that they accepted my $2000 proposition, Grigsby drew a check of the Grigsby Construction Co. on the bank at Dallas, Texas, and that check was forwarded to me. It was drawn on the account of the Grigsby Construction Co. at Dallas. I have forgotten the name of the bank.

Q. Why did you endorse the trust deed and assign it, if it had been satisfied, instead of marking it "satisfied?"

A. Simply because Mr. Rowell requested it, and it was a matter of utter indifference to me whether I discharged it or assigned it.

Q. Why didn't you mark it or otherwise stamp the note "paid" and cancel it, if it was paid.

A. I had no stamp as Receiver for marking the notes of the Jefferson National Bank, and it was very seldom that I ever cancelled them with a pen. I just delivered the note as evidence of the fact that it was paid.

Q. Why didn't you send written releases of the trust deed to the Recorder of Logan County, O. T.?

A. Because I wasn't requested to do so. I simply complied with the request of Mr. Rowell.

Q. At the time you made this assignment of the trust deed, what was said in regard to the assignment? What reason was given for your assigning it instead of cancelling it?
111 A. I think I can turn to a letter in a moment, which was my only reason. I now have the letter above referred to, written at Jefferson, Tex., December 29th, 1898, by T. D. Rowell, which reads as follows:

"H. F. Atkins, Esq., Little Rock, Ark.

DEAR SIR: I herewith hand you certified copy of order in Grigsby Bros. case. You may forward the collaterals transferred to Blank by

express to Mr. G. M. D. Grigsby, or myself, as you may desire, at this place.

Yours truly, T. D. ROWELL."

It was in compliance with this letter that I transferred it in blank.

Q. He never gave you any reason why you should transfer it in blank?

A. He never did.

Q. You had no talk with either Rowell or Grigsby upon that subject?

A. I never did.

Q. I believe you stated you did not know as a matter of fact who furnished the money that was paid to compromise or settle these claims?

A. I know nothing except what was shown in the fact that Grigsby Construction Co. gave the check, and what Mr. Rowell wrote me, as representing Mr. Grigsby. I will say in this regard that Rowell was not employed as my attorney, although Grigsby speaks of him as such. He was representing the creditors.

Q. Then, if was the intent of the parties to the transaction that this should be an assignment of the securities and note, instead
112 of a final settlement, was it not?

A. No sir. I never heard of any assignment until after the settlement was made. As you will notice, the request for me to assign was made December 29th, twenty days after the settlement was effected. The settlement was made by telegraph on the 8th day of December, 1898. After that, it took considerable time to get the approval of the Comptroller of the Currency, and an order made by Judge Bryant of the U. S. Court in Texas. Rowell forwarded that order to me on the 29th of December, in that same letter in which he directed me to transfer the collaterals in blank. And that is the first I had heard of any transfer to be made of the collaterals.

Q. But the question I intended to ask you was, what did you mean by assigning the deed for a valuable consideration, if you did not intend it should be assignment?

A. Purely a matter of form, because they requested it. On December 29th, they requested that I make an assignment instead of a discharge. The matter had been settled twenty days or several days before that. The money had been in my hands nearly twenty days before that. It was a matter of entire indifference to me whether I wrote the word "discharged" on the back of it or transferred it.

Q. Did you, at the time of your appointment as Receiver, or prior thereto or since, have any business relations with the Southern Pine & Lumber Co., T. L. L. Templeton and Benjamin Whittaker, either the last two individually or as partners, or with the American Exchange Bank, of St. Louis?

A. I never had any business dealings with Whittaker, and never met him but once, and in that instance I was trying a law suit against him a few months ago here in our Circuit Court at Little Rock. The Southern Pine & Lumber Co., I had no relations with at all,
113 unless it might have been in connection with the Sulphur Lumber Co. If it was, they had some dealings which were

settled between them and the Jefferson National Bank. But I am under the impression that it wasn't connected in any way with the Sulphur Lumber Co., and I am under the impression that I never had any connection with them in a business way or otherwise.

Q. Did you ever at any time notify the trustee, F. E. Pentecost, that the trust deed had been discharged?

A. No sir, I think not. I took no action further than sending the collaterals back to Grigsby Bros.

Q. As I understand you, you say Mr. Rowell gave no reason why he desired this deed to be endorsed in blank or the note delivered without being cancelled?

A. The only reason I had for it was contained in the letter which I read a few moments ago, which appears in the record.

Redirect examination:

Q. Had you been at the bank and had the cancellation stamp, would you have cancelled it in the regular order of business?

A. That would be the business way of doing these matters. It is the way the banks do it. But a receiver does not carry out the formalities of a bank.

Q. You simply delivered it to the party?

A. Yes sir.

Recross-examination:

Q. You stated that this assignment was written by you and signed by you on the copy of this trust deed?

A. Yes.

Q. Do you know how much Grigsby Bros. owed the bank altogether?

A. I could not state from recollection now.

Q. Have you any means of ascertaining?

111 A. No sir, the books are now in Washington, part of them and part of them in Jefferson. I think this note with the interest thereon was all they owed individually or directly, but they had endorsements in the bank.

Q. State if it is not a fact that they had several individual endorsements in the bank, besides this $5000 note.

A. My impression is, without having the books here to refer to, that there was one small note of $500 or $1000 in addition to this, which was settled in this compromise. I may, however, be mistaken about that.

Q. Do you know the amount of their obligations other than direct to the bank, on judgments, assignments of judgments, endorsements or otherwise?

A. They were bound to the bank on the Clark & Boyce paper, which was in judgment when I became Receiver. There were two notes, and the judgments were for $659.70 and $612.50 respectively on those two notes.

H. F. AUTEN.

It is hereby agreed between the attorneys for plaintiff and defendants that all irregularities as to the manner and form in the

taking of the foregoing deposition, together with the certificate of the notary in certifying the same, save as to objections for incompetency, irrelevancy and immateriality, are hereby waived.

145 EXHIBIT "A." Copy.

JEFFERSON, TEX., *November 20th*, 1898.

H. F. Auten, Esq., Receiver of Jefferson National Bank, Little Rock, Ark.

DEAR SIR: By this we introduce Mr. T. L. Marsalis, who is endorser on some of the collateral which was placed with the Jefferson National Bank by us several years ago.

Owing to unfair and unjust legislation in Texas at the Session of spring, 1891, a panic occurred in the state, millions of dollars of investment money was sent away resulting in the shrinkage of values one half, thereby ruining nine-tenths of the enterprising men of the state. We have investigated Mr. Marsalis's condition thoroughly, and know that he has given up all his property, and has nothing left, and is now getting released from his indebtedness to obviate the necessity of taking the Bankrupt law, and we are perfectly willing to release him as far as we are concerned on the papers and other collateral upon which he is liable and authorize you to do so.

Yours truly, GRIGSBY BROS.

146 EXHIBIT "B." Copy.

LITTLE ROCK, ARK., *Nov. 23rd*, '98.

Mr. H. F. Auten, Receiver National Bank of Jefferson, Little Rock, Ark.

DEAR SIR: Your letter of the 23rd was handed to me by Mr. T. L. Marsalis. I accept the proposition and will comply with terms and conditions proposed.

Yours truly, GRIGSBY BROS.

The defendants also offer in evidence the deposition of G. M. D. Grigsby, which is as follows:

Interrogatories.

1. It appears that H. F. Auten was the Receiver of the National Bank of Jefferson and as such held a note against Grigsby Bros. for $5000.00 secured by trust deed on lots in Guthrie & Oklahoma City it also appears that some kind of settlement was made with Auten by which the note and trust deed were obtained. Did you have anything to do with arranging the settlement with Auten?

2. Did you have any arrangement or agreement with any person by which you were to procure the money needed to settle with Auten; if so, what arrangement did you have and with whom.

3. Were you to secure the person who furnished the money in any way, if so how were you to secure him.

4. Who was T. D. Rowell and what interest did he repre-
147 sent. Did he not represent the creditors of the Jefferson Nat. Bank. Did you ever explain to him that you were obtaining the money to pay off Auten by a loan and that you wanted the note and trust deed transferred from Auten so they could be held as further security?

5. Who furnished the money to pay Auten, how was it furnished, and why was your check and not his sent to Auten?

6. Whose money did you send to Auten, and was it ever replaced if so when and by whom?

The said G. M. D. Grigsby answers the written interrogatories propounded by plaintiff, as follows:

1st Interrogatory: I arranged the settlement with H. F. Auten.

2nd Interrogatory: I had an arrangement with W. B. Ward to furnish the money to make the payment which he furnished.

3rd Interrogatory: I was to turn over to W. B. Ward the stuff which he, Auten held, which included the $5000.00 note and *mtge.*, bank stock and other properties, which included mortgage in question.

4th Interrogatory: T. D. Rowell was an attorney of Jefferson, and represented the depository of the bank, and he did not represent me, but who he (Rowell) represented I am not fully advised. I explained to Rowell that I did not want the papers cancelled, I wanted them transferred.

5th Interrogatory: Mr. Ward was out of town at the time, and I gave Grigsby Construction Co.'s check for $2000.00. I delivered the check to T. D. Rowell.

6th Interrogatory: On Mr. Ward's return I turned him over the papers I had received from Mr. Auten, and he endorsed paper to the extent of $2500.00 two thousand of which replaced the check of Grigsby Construction Co.

148 Mr. Ward subsequently a few months afterwards endorsed the Grigsby Bros. for $5000.00 more, these collaterals the mortgage notes etc. were to be held by Mr. Ward to secure his endorsement.

I do not know where the original mortgage is that we gave to the bank. I here hand to the Notary a copy of the mortgage given by the Grigsby Bros. to the bank which shows the transfer in blank by H. F. Auten receiver and is the paper delivered to me by Mr. Rowell when I made the settlement with Auten and was by me turned over to Mr. Ward as above stated. Said copy of the mortgage is attached to my answers.

Cross-examined by Mr. Cook:

Q. Has Grigsby Bros. ever paid the notes indorsed by Ward for which the $5000.00 note and mortgage was delivered as collateral security for his endorsement?

A. They have been partially paid, but there are still $5000.00 due on the note on which Mr. Ward is indorser.

Q. Are these the same notes or notes for a part of the same debt incurred by the indorsements of W. M. Ward when the collateral was delivered to him?

A. It is the same debt or the renewal of the same.

Q. How much was paid on the first note for $2500.00 endorsed by Mr. Ward which formed a part of the obligations by endorsement for which the collateral was put up?

A. I think that all of that note was paid and the other was not.

Reexamined by Mr. PRENDEGAST:

I here hand to the notary the original note given by Grigsby Bros. to the bank which was secured by the mortgage, and shows the renewal of Grigsby Bros. on the back. This note was rec'd from Auten when I made the settlement with him and delivered to W. B. Ward with the other papers.

119 I have no personal knowledge of the circumstances under which the Union Lumber Mills Co. gave the note for $884.90 upon which judgment was obtained in the court in Dallas Texas in 1892, my brother D. J. Grigsby attended to that matter. T. L. L. Temple owned one fifth interest in the Union Lumber Mills Co., and Grigsby Bros. four fifths.

Q. When and how did you first learn of the suit at Guthrie in which the American Exchange Bank was plaintiff wherein you and T. L. L. Temple and others were Defendants wherein the lot now sued for was attached and sold?

A. I cannot be definite, but some five or six years ago.

G. M. D. GRIGSBY.

150 The National Bank of Jefferson,

$5000.00. JEFFERSON, TEXAS, *June* 11th, 1891.

Ninety days after date we promise to pay to the order of ourselves at The National Bank of Jefferson, in the City of Jefferson, Texas, the sum of Five Thousand Dollars, for value received, negotiable and payable without defalcation or discount with interest at the rate of 1 per cent. per Mo. from maturity until paid and 10 per cent. attorneys' fees if sued upon or placed in hands of an attorney for collection.

GRIGSBY BROS.

Endorsed: For a valuable consideration heretofore rec'd by us from the Nat'l Bank of Jefferson Tex. we hereby acknowledge the justness of the note & renew our promise to pay the same. Grigsby Bros. Grigsby Bros.
June 11 95.

EXHIBIT "B."

G. M. Grigsby and D. J. Grigsby to F. E. Pentecost.

Deed of Trust.

STATE OF TEXAS, *County of Marion:*

Know all men by these presents: That we, G. M. Grigsby and D. J. Grigsby (comprising the firm of Grigsby Bros.) of the county of Marion in the State of Texas, for and in consideration of the sum of Ten Dollars, paid by F. E. Pentecost, of the City of Guthrie, in the State of Oklahoma, the receipt of which is hereby acknowledged, have sold, and by these presents do sell, convey transfer and confirm unto the said F. E. Pentecost and to his successors in this trust the following described property, to-wit:

151 An undivided 4-5 interest in and to Lots 17, 18, 19, 20 & 21, in Block #60 in Oklahoma City, in accordance with the recorded plat thereof in the Territory of Oklahoma; also an undivided 4-5 interest in and to an undivided 5-10 or ½ interest on Lots Nos. (4) four, (5) five, (6) six, (7) seven, and (21) twenty-one in Block No. 43, in town of Guthrie, according to the recorded plat thereof and the Territory of Oklahoma; also an undivided 4-5 interest in lot 9 in #54 fifty-four, Guthrie Proper, according to the recorded plat thereof, Territory of Oklahoma; also an undivided 4-5 interest in and to an undivided one-half interest in Lots (11) eleven, & (12) twelve, Block (43) forty-three, on Cleveland Av. East Guthrie, according to the recorded plat thereof, Territory of Oklahoma; also an undivided 4-5 interest in and to an undivided ½ interest in Lot (15) fifteen, Block (51) fifty-one, on Harrison Avenue, East Guthrie, according to the recorded plat thereof.

Together with all and singular the rights, number, hereditaments, and appurtenances to the same in any manner belonging or appertaining.

To have and to hold all and singular the property above described unto the said F. E. Pentecost or substitute forever.

And we do by these presents bind ourselves, our heirs, executors and administrators to warrant and forever defend all and singular the said property unto the said F. E. Pentecost or his substitute herein against the claim or claims of any and all persons whatsoever claiming or to claim the same or any part thereof.

This conveyance, however, is intended as a trust for the better securing of the National Bank of Jefferson, of the County of Marion and State of Texas, in the payment of a certain promissory note, of which the following is a substantial copy:

152 The National Bank of Jefferson, Texas.

$5000.00. JEFFERSON, TEXAS, *June 11th*, 1891.

Ninety days after date we promise to pay to the order of ourselves or the National Bank of Jefferson, in the City of Jefferson, Texas,

the sum of Five Thousand Dollars, for value received, negotiable and payable with interest, defalactions and discount, with interest at the rate of 1 per cent. per month from maturity until paid, and ten per cent. attorney's fees if sued upon or placed in the hand of an attorney for collection.

(Signed) GRIGSBY BROS.

and endorsed on back by Grigsby Bros., and bearing interest at the rate of 1 per cent. from maturity per month, upon payment of which promissory note, according to its face and tenor, being well and truly made, then, in such case this conveyance shall become null and void and of no further force or effect, and shall be released at the cost and expense of the said F. E. Pentecost. But in the — of the failure or default in the payment of said promissory note, together with the interest thereon accrued, according to its terms and face at the maturity of the same, then and in such event the said F. E. Pentecost is by these presents fully authorized and empowered, and it is made his special duty at the request of the said Nat. Bank of Jefferson at any time made after the maturity of said promissory note, to sell the above described lots of land to the highest bidder for cash in hand at the Court House door of the Counties where situate and giving public notice of the time, place and terms of said sale by posting in three public places in said county, one being the Court House door, prior to said day of sale and to make to the purchaser or purchasers thereof a good and sufficient deed in law to the lands so sold with the usual covenants and warrants.

153 and to receive the proceeds of said sale and the same to apply to the payment of said note, the interest there on accrued, and the expenses of executing said trust, including per cent. commission to said Trustee, holding the remainder thereof subject to the order of ourselves, the said G. M. D. & D. J. Grigsby, and is hereby specially provided that should the said F. E. Pentecost from any cause whatever fail or refuse to act or become disqualified from acting as such Trustee, then the said President or Cashier of said National Bank shall have full power to appoint a substitute in writing, who shall have the same powers as are hereby delegated to the said F. E. Pentecost, and I by these presents fully and absolutely ratify and confirm any and all action which the said F. E. Pentecost, or his substitute as herein provided, may do in the premises by virtue thereof.

Witness our hands and scroll for seals this 27th day of July, 1891.

G. M. D. GRIGSBY.
D. J. GRIGSBY.

THE STATE OF TEXAS, *County of Marion:*

Before me, Lee Sherrell, a Notary Public in and for Marion County, Texas, on this day personally appeared G. M. D. Grigsby, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 27th day of July, 1891.

[SEAL.] LEE SHERRELL,
Notary Public, Marion County, Texas.

154 THE STATE OF TEXAS, *County of Bowie:*

Before me, M. D. Tilson, a Notary Public in and for Bowie County, Texas, on this day personally appeared D. J. Grigsby, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 30th day of July, 1891.

M. D. TILSON,
A Notary Public, Bowie County, Texas.

Filed for record July 31st, 1891, at 5.05 P. M.
Recorded August 1st, 1891, at 2.05 P. M.

H. H. BOCKFINGER,
County Clerk.

I hereby acknowledge that I have this day been served with a copy of above and foregoing instrument and same left in my office.

Witness my hand at Guthrie, May 1st, 1895.

W. W. PAINTER,
Sheriff Logan County, Okla. Ter.,
By H. W. PAINTER, *Dept.*

I hereby sell, assign and transfer the right title and interest of the National Bank of Jefferson, Texas, in and to a note and deed of trust of which the foregoing are copies to ——— for a valuable consideration hereby acknowledged.

H. F. AUTEN,
Receiver of the National Bank of Jefferson, Tex.

Dated Dec. 28th, 1898.

155 Said defendants offer in evidence the deposition of W. B. WARD, which is as follows:

The National bank at Jefferson failed in May, 1896, and H. F. Auten was Receiver of said bank in 1898 in December.

Q. This is a suit brought by you in Guthrie, Oklahoma Territory, against Grigsby Bros. on a note for $5000.00 and to foreclose a trust deed on lots in Guthrie and the town of Oklahoma, was this note and trust deed an asset of said bank in the hands of the receiver?

A. It was.

Q. What settlement was made with Auten as receiver of the bank by which the note and trust deed were obtained?

A. I do not know what settlement.

Q. What agreement did you have, if any, with Grigsby Bros. about settling with Auten?

A. Mr. G. M. D. Grigsby came to me and told me he had made a settlement with Mr. Auten, and had sent him check for $2000.00 of the Grigsby Construction Co., and that he had instructed the collaterals held by Auten to be transferred in blank, and that he would deliver the same to me if I would endorse for him for $2000.00 so that he could replace the money with the Grigsby Construction Co.

I endorsed for him for the amount of $2000.00 or $2500.00 and he delivered to me the collaterals received from Auten.

Grigsby had come to me before he had made the settlement with Auten and stated that he was negotiating a settlement and would want to get the money from me to carry it out. I agreed to do it, but was away from town when the settlement was accomplished.

Cross-examined:

156 Q. For what purpose were the collaterals received from Auten delivered to you?

A. To secure me in the indorsements I had given to the Grigsby Bros.

Q. Why was it that the Grigsby Construction Co. money was sent to pay Auten, instead of yours?

A. When the matter was closed I was away from town.

Q. What was the understanding or agreement between you and Grigsby Bros. as to whether the note and trust deed were to be cancelled or kept alive, and if kept alive, for what purpose was this done?

A. The understanding was that they were to be kept alive to pay me the money I would let them have.

Q. Did you, subsequent to this, let Grigsby Bros. have any money or indorse for them?

A. Subsequent to this, perhaps as much as a year later, I endorsed for Grigsby Bros. for $5000.00, and by agreement I was to hold the collaterals received from Auten for this endorsement or any other indebtedness they might owe to me.

Q. How much of that indebtedness is now unpaid?

A. $5000.00 and about $100.00 interest.

Cross-interrogatories by J. D. Cook:

Q. Is this $5000.00 note upon which you are endorser now past due?

A. It is now past due.

Q. Who is the holder?

A. State National Bank Fort Worth.

Q. Have you paid said note as endorser?

A. No.

Q. Is it carried by the bank as overdue paper?

A. I think it matured Aug. or Sept., 1902.

157 Q. Was this note on which you are endorser made by Grigsby Bros., or by the Grigsby Construction Co.?

A. It was made by the Grigsby Construction Co. and by G. M. D. Grigsby individually.

Q. Is Grigsby Construction — a corporation or partnership?

A. It is a corporation. Grigsby Bros. do not owe me anything on individual account only as endorser.

Q. Then if this is the only endorsement for which you are responsible Grigsby Bros. do not owe you anything because it has been merged into an obligation of Grigsby Construction Co. and G. M. D. Grigsby, is that correct?

A. It is that way on paper, but I rely upon G. M. D. Grigsby and his brother to pay me the debt.

Q. Is not the Grigsby Construction Co. a solvent corporation and amply able to pay their obligations?

A. They are regarded as solvent.

Q. Do you hold any other collateral only that named to secure you against loss for the Grigsby Construction Co. and your endorsement for them?

A. Nothing of value. The only collateral I held was the mortgage on the Oklahoma property and some bank stock in Texarkana, which was considered of no value.

Re-examined by PRENDERGAST:

I cannot state where the original mortgage is, I cannot find it. The copy attached to Grigsby's answers is the paper I received.

W. B. WARD.

Said defendants also offer in evidence the deposition of T. D. ROWELL, which is as follows:

I was instrumental in getting up the settlement between
158 Grigsby Bros. and H. F. Auten Receiver of the bank, I represented the creditors of the bank. Auten held a debt against Grigsby Bros. secured by mortgage on Oklahoma property.

Grigsby affected a settlement with Auten by putting up $2000.00 which he did about the 8th of Dec. 1898. It then was necessary to get the consent of the Comptroller, and an order of the Federal Judge. Mr. Auten procured the consent of the Comptroller to the settlement, and I procured an order of the Federal Judge approving the settlement. And on Dec. 29th, 1898 I sent Mr. Auten a copy of this order and requested him to transfer in blank the security he held for the debt. He sent me a copy of the mortgage on the Oklahoma property transferred by him in blank, which copy is attached to Grigsby's answers.

T. D. ROWELL.

The defendants, Southern Pine Lumber Company and China and China, here Rest.

The plaintiff, W. B. Ward, offers in evidence the original note and trust deed, endorsed by the Receiver of the Jefferson National Bank, H. F. Auten, and the notice served on W. W. Painter, Sheriff of Logan County, by the Bank, through its attorney, in 1895.

By Mr. COOK: Let them all be considered as offered.

The same are as follows:

159 The National Bank of Jefferson.

$5000.00. JEFFERSON, TEXAS, *June* 11th, 1891.

Ninety days after date we promise to pay to the order of ourselves at The National Bank of Jefferson, in the City of Jefferson, Texas, the sum of Five Thousand Dollars, for value received, negotiable and payable without defalcation or discount with interest at the rate of 1 per cent. per mo. from maturity until paid and 10 per cent. attorney's fees if sued upon or placed in hands of an attorney for collection.

GRIGSBY BROS.

Endorsed: For a valuable consideration heretofore rec'd by us from the Nat'l Bank of Jefferson, Tex., we hereby acknowledge the justness of the note & renew our promise to pay the same. Grigsby Bros. Grigsby Bros. June 11 95.

EXHIBIT "B."

G. M. Grigsby and D. J. Grigsby
to
F. E. Pentecost.

Deed of Trust.

STATE OF TEXAS, *County of Marion:*

Know all men by these presents, That we, G. M. Grigsby and D. J. Grigsby (comprising the firm of Grigsby Bros.) of the county of Marion in the State of Texas, for and in consideration of the sum of Ten Dollars, paid by F. E. Pentecost, of the City of Guthrie, in the State of Oklahoma, the receipt of which is hereby acknowledged, have sold, and by these presents do sell, convey transfer and confirm unto the said F. E. Pentecost and to his successors in this trust the following described property, to-wit:

160 An undivided 4 5 interest in and to Lots 17, 18, 19, 20 & 21, in Block = 60 in Oklahoma City, in accordance with the recorded plat thereof in the Territory of Oklahoma; also an undivided 4 5 interest in and to an undivided 5 10 or $\frac{1}{2}$ interest on Lots Nos. (4) four, (5) five, (6) six, (7) seven, and (21) twenty-one in Block No. 43, in the town of Guthrie, according to the recorded plat thereof *and* the Territory of Oklahoma; also an undivided 4 5 interest in lot 9 in — = 54 fifty four, Guthrie Proper, according to the recorded plat thereof, Territory of Oklahoma; also an undivided 4 5 interest in and to an undivided one half interest in Lots (11) eleven, & (12) twelve, Block (43) forty-three, on Cleveland Avenue, East Guthrie, according to the recorded plat thereof, Territory of Oklahoma; also an undivided 4 5 interest in and to an undivided $\frac{1}{2}$ interest in Lot (15) fifteen, Block (51) fifty-

one, on Harrison Avenue, East Guthrie, according to the recorded plat thereof.

Together with all and singular the rights, *numbers*, hereditaments, and appurtenances to the same in any manner belonging or appertaining.

To have and to hold all and singular the property above described unto the said F. E. Pentecost or substitute forever.

And we do by these presents bind ourselves, our heirs, executors and administrators to warrant and forever defend all and singular the said property unto the said F. E. Pentecost or his substitute herein against the claim or claims of any and all persons *whatsoever* claiming or to claim the same or any part thereof.

This conveyance however, is intended as a trust for the better securing of the National Bank of Jefferson, of the County of Marion and State of Texas, in the payment of a certain promissory note, of which the following is a substantial copy:

161 The National Bank of Jefferson, Texas.

$5000.00 JEFFERSON, TEXAS, *June 11th*, 1891.

Ninety days after date, we promise to pay to the order of ourselves or the National Bank of Jefferson, in the City of Jefferson, Texas, the sum of Five Thousand Dollars, for value received, negotiable and payable with interest, defalcations and discount, with interest at the rate of 1 per cent. per month, from maturity until paid, and ten per cent. attorney's fees if sued upon or placed in the hands of an attorney for collection.

(Signed) GRIGSBY BROS.

and endorsed on back by Grigsby Bros. and bearing interest at the rate of 1 per cent. from maturity per month, upon payment of which promissory note, according to its face and tenor, being well and truly made, then, in such case this conveyance shall become null and void and of no further force or effect, and shall be released at the cost and expense of the said F. E. Pentecost. But in the — of the failure or default in the payment of said promissory note, together with the interest thereon accrued, according to its terms and face at the maturity of the same, then and in such event the said F. E. Pentecost is by these presents fully authorized and empowered, and it is made his special duty at the request of the said Nat. Bank of Jefferson at any time made after the maturity of said promissory note, to sell the above described lots of land to the highest bidder for cash in hand at the Court House Door of the Counties where situate and giving public notice of the time, place and terms of said sale by posting in three public places in said county, one being the Court House door, prior to said day of sale and to make to the purchaser or purchasers thereof a good and sufficient deed in law to the lands so sold with the usual covenants and warrants, and to receive the proceeds of said sale and the same to apply to the payment of
162 said note, the interest thereon accrued, and the expenses of executing said trust, including — per cent. commission to

said Trustee, holding the remainder thereof subject to the order of ourselves, the said G. M. D. & D. J. Grigsby, and is hereby specially provided that should the said F. E. Pentecost from any cause whatever fail or refuse to act or become disqualified from acting as such Trustee, then the said President or Cashier of said National Bank shall have full power to appoint a substitute in writing, who shall have the same powers as are hereby delegated to the said F. E. Pentecost, and I by these presents fully and absolutely ratify and confirm any and all actions which the said F. E. Pentecost, or his substitute as herein provided, may do in the premises by virtue thereof.

Witness our hands and scroll for seals this 27th day of July, 1891.

G. M. D. GRIGSBY.
D. J. GRIGSBY.

THE STATE OF TEXAS, *County of Marion:*

Before me, Lee Sherrell, a Notary Public in and for Marion County, Texas, on this day personally appeared G. M. D. Grigsby, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 27th day of July, 1891.

[SEAL.]

LEE SHERRELL,
Notary Public, Marion County, Texas.

THE STATE OF TEXAS, *County of Bowie:*

Before me, M. D. Tilson, a Notary Public in and for Bowie County, Texas, on this day personally appeared D. J. Grigsby,
163 known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 30th day of July, 1891.

M. D. TILSON,
A Notary Public, Bowie County, Texas.

Filed for record July 31st, 1891, at 5.05 P. M.
Recorded August 1st, 1891, at 2.05 P. M.

H. H. BOCKFINGER,
County Clerk.

I hereby acknowledge that I have this day been served with a copy of above and foregoing instrument and same left in my office.

Witness my hand at Guthrie, May 1st, 1895.

W. W. PAINTER,
Sheriff Logan County, Okla. Ter.,
By H. W. PAINTER, *Dept.*

I hereby sell, assign and transfer the right title and interest of the National Bank of Jefferson, Texas, in and to a note and deed of trust of which the foregoing are copies to —— for a valuable consideration hereby acknowledged.

H. F. AUTEN,
Receiver of the National Bank of Jefferson, Tex.

Dated Dec. 28th, 1898.

It is here admitted that W. B. Ward or the Jefferson National Bank or H. F. Auten, Receiver of the Bank, or F. E. Pentecost, Trustee, were never made parties to suit No. 1524, The American Exchange Bank of St. Louis, against the Southern Pine Lumber Company, and others, tried in the district court of Logan County, Oklahoma, in March, 1894, and it is further admitted that the trustee, F. E. Pentecost, was a citizen and resident of Guthrie, Logan County, Oklahoma at all times since the commencement of
164 the suit and up until after final judgment.

It is further admitted that said Pentecost is at this time deceased.

The Plaintiff, W. B. Ward, Here Rests.

It is admitted that of the Union Lumber Mills interest, Grigsby Bros. owned four-fifths, and Temple one-fifth, and the interest they held in all this realty they held it in that proportion, except there was some of this property they only had a half interest in.

The defendants, Grigsby Bros. offer in evidence a certified copy of the plaintiff's original petition in the suit at Dallas, Texas, the American Exchange Bank against D. J. Grigsby, G. D. M. Grigsby, T. L. L. Temple, composing the firm of the Union Mills Company, and T. L. L. Temple and W. W. Wittaker, composing the Southern Pine Lumber Company, and also T. L. L. Temple, individually.

Objected to by the defendants' Southern Pine Lumber Co. and Chinn and Chinn as incompetent, irrelevant and immaterial, which objection was by the Court overruled, to which said defendants excepted.

The same is as follows:

Plaintiff's Original Petition.

STATE OF TEXAS, *County of Dallas:*

Suit in the District Court of the 14th Judicial District of Texas, at Dallas.

To the Honorable District Court:

Your petitioner, "American Exchange Bank," of St. Louis, Missouri, hereinafter called plaintiff, complaining of D. J. Grigsby, G. M. D. Grigsby and T. L. L. Temple, composing the firm
165 of the Union Lumber Mills Company; and also complaining of T. L. L. Temple and Ben Whittaker composing the

firm of "Southern Pine Lumber Company," and also complaining of T. L. L. Temple individually, all of whom are hereinafter called defendants, shows to the Court that plaintiff is a private corporation, organized and incorporated under and by virtue of the laws of the state of Missouri, having its domicile and business office in St. Louis, Missouri; that the defendant, D. J. Grigsby, is a resident citizen of Harrison County, Texas, and the defendant G. M. D. Grigsby, is a resident citizen of Marion County, Texas, and that the defendants, T. L. L. Temple and Ben Whittaker are both resident citizens of Bowie County, in said State.

And for cause of complaint, plaintiff shows that heretofore, to-wit: on August 6th, 1891, the defendants, G. M. D. Grigsby, D. J. Grigsby and T. L. L. Temple, were doing business as a firm and copartnership under the name of "Union Lumber Mills Company;" that on said date they, the said defendants, under their firm name and acting by the said D. J. Grigsby made and executed in their said firm name their certain promissory note in words and figures as follows, to-wit:

"$884.90. "LINDEN, TEXAS, *August 6th*, 1891.

Ninety days after date without grace for value received we promise to pay to the order of American Exchange Bank of St. Louis, Mo., Eight Hundred and Eighty-four and 90 100 Dollars, with interest at the rate of twelve per cent. per annum from date until paid, and ten per cent. additional on amount princip*le* and interest unpaid for attorney's fees if placed in the hands of an attorney for collection, payable at Texarkana, Texas, but if not paid promptly at m*a*turity, then this note shall be payable at Dallas, Dallas County, Texas.

166 UNION LBR. MILLS CO.,
By D. J. GRIGSBY."

That also at said time the defendants, T. L. L. Temple and Ben Whitaker were a firm and copartnership doings business under the name of "Southern Pine Lumber Company," and on said date that the said defendants and, before the delivery of said note above set out, endorsed the same in blank by writing their said firm name across the back of said note as follows, to-wit

"Southern Pine Lbr. Co. T. L. L. Temple."

and the said T. L. L. Temple also at the same time and before the delivery of the said note endorsed said note individually by writing his name across the back thereof, thereby said defendants guaranteeing and securing its full and prompt payment according to the terms and conditions thereof to whomsoever said defendants, trading as Union Lumber Mills Co., as aforesaid, might deliver the same, and thereby said defendants each and all became bound and liable and promise to pay the said sums of money, in said note specified, at the time and according to the terms and tenor of same, to whomsoever the said defendants, Union Lumber Mills Co. might deliver the said note.

And plaintiff further shows that said note, executed and endorsed by said defendants as aforesaid, was, on said day, for a valuable consideration, thereafterward paid by this plaintiff, delivered by said defendants, trading as Union Lumber Mills Co., to your plaintiff, and thereby each and all of said defendants became liable and promised plaintiff to pay the same according to its terms, tenor and effect at its maturity. And further each and all of said defendants also promised and became bound and liable to pay to your plaintiff an additional sum of ten per cent. on the principal and interest
167 unpaid by virtue of said note, for attorney's fees if placed in the hands of an attorney for collection; and each and all of them further specially promised and became bound to pay said note at Dallas, in Dallas County, Texas, if same was not promptly paid at maturity.

(Plaintiff further shows that said note was also endorsed by the firm of J. H. Bemis & Co. before its delivery, but plaintiff does not join said J. H. Bemis & Co. as defendants because they are utterly and notoriously insolvent.)

The plaintiff shows that it is still the owner and holder of said note, and plaintiff avers that the same is now long since past due and is wholly unpaid; that, though often requested at the maturity of said note by the plaintiff, the defendants have each and all failed and refused and still fail and refuse to pay said note or any part thereof, to plaintiff's great damage.

That in order to enforce the payment of said note, plaintiff has been compelled to employ attorneys to institute this suit, and to put said note in their hands for collection, and by occasion of the premises, the said defendants and each of them have become bound and liable to pay to the plaintiff in addition to the principal and interest of said note an additional sum of ten per cent. on the amount thereof for attorneys' fees; and they have become bound and liable further to pay the said entire sums of money at Dallas, in Dallas County, Texas, in accordance with the terms, tenor and effect of said note, yet, though often requested, said defendants have wholly failed and refused and still fail and refuse to pay said sums of money or any part thereof to plaintiff's great damage in the sum of Twelve Hundred Dollars.

Premises considered, plaintiff now prays for citation in terms of the law, requiring each and all of said defendants to answer this petition and that, on hearing, the plaintiff have judgment for its said debt, interest, attorneys' fees and costs of suit together
168 with all other relief both general and special to which the plaintiff may be entitled.

McCORMICK & SPENCE
Attys for Pl'ff.
J. H. STEWART, *Of Co.*
By F. R. FOOTE, *Dep.*

Filed Nov. 30, 1891.

Judgment.

9659.

AMERICAN EXCHANGE BANK OF ST. LOUIS, MO.,
vs.
UNION LUMBER MILLS CO. ET AL.

SATURDAY, *January 9th*, 1892.

This day came on this cause to be heard and then came pl'ff by attorney and announced ready for trial, but the def'ts having been duly and legally served with citation herein requiring them to appear and answer at the present term of the Court, came not but wholly made default. Wherefore, the plaintiff ought to have and recover of and from the defendants its damages by occasion of the premises. And it appearing to the Court that plaintiff's cause of action is liquidated and proved by an instrument in writing sued upon, purporting and alleged to have been executed by defendants, (to-wit: the promissory note sued on by plaintiff). Therefore, it is ordered by the Court that the Clerk of this Court do assess the damages sustained by plaintiff. And the said Clerk here now having assessed said damages at the sum of One Thousand and Twenty-two & 38 100 ($1022.38) Dollars, (being the amount of the note sued upon herein, principal, interest and attorney's fees as stipulated in said note). Therefore, it is considered by the Court that plaintiff, American Exchange Bank of St. Louis, Mo., do have and recover of and from D. J. Grigsby, G. M. D. Grigsby and T. L. L. Temple, composing the firm of Union Lumber Mills Co., and from each of
169 them individually (each of said defendants having been personally served with citation herein), and also of and from T. L. L. Temple and Ben. Whittaker, composing the firm of Southern Pine Lumber Company, and from each of them individually (each of said defendants having been personally served with citation herein) and of and from T. L. L. Temple, as an individual, the said sum of One Thousand and Twenty-two & 38 100 ($1022.38) Dollars, with interest thereon from this date at 12% per annum, that being the rate of interest legally specified in the note sued on, and together with all costs herein incurred, for all of which let execution issue.

* * * * * * *

Alias Execution.

The State of Texas to the Sheriff or any Constable of Bowie County, Greeting:

Whereas, on the 9th day of January A. D. 1892, The American Exchange Bank of St. Louis, Mo., (a Banking Corporation) recovered a judgment in the District Court of Dallas County, State of Texas, against D. J. Grigsby, G. M. D. Grigsby and T. L. L. Temple, composing the firm of The Union Lumber Mills Co., and each of

them individually, and against T. L. L. Temple & Ben Whitaker, composing the firm of Southern Pine Lumber Co., & each of them individually, and T. L. L. Temple, individually, for the Sum of One *Thousand and Twenty-two and 38 100* Dollars, besides the Cost in that behalf expended, as of record is manifest in Book No. 3, page — Minutes of Court of the 44th Judicial District in and for Dallas County Texas, and whereas original Execution to Dallas county has been returned *nulla bona*.

Therefore you are hereby commanded, that the goods and chattels, lands and tenements of the said D. J. Grigsby, G. M. D.
170 Grigsby and T. L. L. Temple, composing Union Lumber Mills Co., and T. L. L. Temple and Ben Whitaker, composing Southern Pine Lumber Co., and each of said defendants individually, you cause to be made the sum of One Thousand Twenty Two and 38 100 Dollars with interest therein at the rate of 12 per cent. per annum from the 9th day of January, 1892, together with the sum of Twenty-seven & 85 100 Dollars cost of said suit, and the further costs of executing this writ.

Herein Fail Not, and have you said moneys, together with this writ, before said Court at the Court House, in the City of Dallas, Dallas County, within 60 days next.

Witness: J. H. Stewart, Clerk of the District Court of Dallas County.

Given under my hand and the seal of said Court, at office in the City of Dallas, this 2nd day of Feby., A. D. 1892.

J. H. STEWART, *Clerk*.
[L. S.] By I. A. MOORE, *Deputy*.

Issued this 2 day of Feby. 1892.

J. H. STEWART,
Clerk District Clerk,
By I. A. MOORE, *Deputy*.

171 *Bill of Costs.*

Filing & Docketing	.35
Iss. Cit. & Copies of Petition	15.00
Shff. of Marion Co. (Pd. by Plff.)	1.60
" Bowie " (" " ")	3.10
" Harrison " (" " ")	1.60
Ent. Judgment	1.25
Assessing Damages	.50
Ent. Appearances	.45
Taxing Cost	.25
Ex. & Ret.	1.50
Shff. Dallas Ret. of Ex.	.75
Alias Ex. & Ret.	1.50
	$27.85

Received of W. Spence Att'y for Plffs. $21.55 in full of costs due officers of Court in above cause.

J. H. STEWART, *Clk.*

Sheriff's Return.

Came to hand on the 3rd day of Feby. A. D. 1892 at 8 o'clock A. M. and executed on the 17th day of Feby. A. D. 1892 at 10 o'clock A. M. by collecting the full amount of Pri-ciple & costs & Interest of this execution from T. L. L. Temple and depositing same in the Texarkana National Bank of Texarkana Texas, to the credit of Mess. McCormick & Spence, Att'ys Dallas Texas.

R. G. CANON,
Sheriff Bowie Co., Tex.,
By J. G. SABINE, *Dep.*

Fees Pd.

* * * * * * *

Number of case.	Att'y's name.	Parties name.	No. execu'n.	Amount judgment.	Date of judgment.	Credits. Mo.	Day.	Yr.	Dolls.	Cts.	To whom directed and when issued.	To whom delivered.	When returned.	Endorsements and return of sheriffs.
9569	Mc & Spence	American Exchange Bank of St. Louis, Mo. vs. Union Lumber Mills Co. *et al.*	1	$1022.38 25.00	Jan'y 9,92	.....			None.	..	Sh'ff Dallas Co. Feb'y 2, 1892	Mc & Spence	....	This writ came to hand Feb'y 2nd, 1892, and returned Feb'y 2nd, 1892 no property of within named defendants found in Dallas County, Texas. W. H. Lewis, Sheriff. By T. F. Carson, Deputy. Return 75c. Came to hand on the 3rd day of February, A. D. 1892 at 8 o'clock A. M. and executed on the 17th day of February A. D. 1892 at 10 o'clock A. M. by collecting the full amount of principal & Cost & Interest of this execution from T. L. L. Temple and depositing same in the Texarkana National Bank of Texarkana, Texas, to the credit of Messrs. McCormick & Spence, Att'ys, Dallas, Texas. R. G. Canon, Sheriff Bowie County, Tex. By J. G. Sabine, Dep. Fees Pd.
			2	1022.38 27.85	" "	.....			"	"	" "			

173 THE STATE OF TEXAS, *County of Dallas:*

I, H. W. Jones, Clerk, District Courts, Dallas County, Texas, hereby certify that the foregoing seven pages contain true and correct copies of Plaintiff's Original Petition, Judgment of the Court, Alias Execution and Sheriff's return thereon, and of the Entry on the Execution Docket and record of the Sheriff's returns on both the first and alias executions, in Cause No. 9659, American Exchange Bank of St. Louis *vs.* Union Lumber Mills Company *et al.*, as the same now appear on file and of record in my office.

Given under my hand and seal of office, at Dallas, this, the 27th day of November, A. D. 1901.

[SEAL.] H. W. JONES,
Clerk, District Courts, Dallas County, Tex.

THE STATE OF TEXAS, *County of Dallas:*

I, Richard Morgan, Judge of the District Court of the 44th Judicial District of Texas, do hereby certify that H. W. Jones, whose genuine signature appears to the above and foregoing certificate, is the duly elected and qualified Clerk of said Court, the same being a Court of record, and was such Clerk at the time of signing said certificate, and that his acts as such Clerk are entitled to full faith and credit; and I further certify that the foregoing certificate is in due form of law.

Given under my hand and seal of said Court, this the 27th day of November, A. D. 1901.

[SEAL.] RICH'D MORGAN,
Judge of the District Court of the 44th Judicial District of Texas.

174 THE STATE OF TEXAS, *County of Dallas:*

I, H. W. Jones, Clerk District Courts, Dallas County, Texas, hereby certify that Richard Morgan, whose genuine signature appears to the above and foregoing certificate, is the duly elected and qualified Judge of the District Court of the 44th Judicial District of Texas, and was such Judge at the time of signing said certificate, the same being a Court of record, and that his acts as such Judge are entitled to full faith and credit; and I further certify that the foregoing certificate is in due form of law.

Given under my hand and seal of office, at Dallas, this, the 27th day of November, A. D. 1901.

[SEAL.] H. W. JONES,
Clerk, District Courts, Dallas County, Tex.

Endorsed: No. 9659. American Exchange Bank of St. Louis, Mo., *vs.* Union Mills Lumber Co. *et al.*—Certified copies of Original Petition, Judgment, Alias Execution and Return, and Entry on Execution Docket.

175 *Interrogatories by Defendants D. J. and G. M. D. Grigsby, in Support of Cross Petition to T. L. L. Temple.*

1. It appears from the records in Guthrie, Oklahoma that in the fall of 1894 a suit was filed and attachment issued in cause No. 1524 American Exchange Bank *vs.* T. L. L. Temple, Ben Whitaker, D. J. Grigsby, G. M. D. Grigsby and the Southern Pine Lumber Co. and Union Mills Lumber Co. Did you procure that suit to be instituted, either directly or indirectly.

2. Did you consult the American Exchange Bank in any way about filing the suit if so with whom did you consult and how, did you write to the Bank about it, if so when and what did you write.

3. The suit is based on a judgment obtained at Dallas Texas, and also on an account for $294.56 who transferred said account to the American Exchange Bank. I mean what person did the act and made the trade by which the account was transferred.

4. How much was paid by the American Exchange Bank for the account and to whom did that bank pay the money.

5. Is it not a fact that the said bank paid nothing for said account and had no title to nor ownership of said account at any time.

6. How did the Southern Pine Lumber Company as an Arkansas corporation become in any way indebted to the American Exchange Bank and why was said corporation made a defendant in said suit No. 1524 at Guthrie, as it appears they are defendants.

7. Who was or were the real owners of the stock & property of the Southern Pine Lumber Co. in February 1892 and who was then the real owners of the copartnership the Southern Pine Lumber Company, I do not merely want to know in whose *the* name the stock and ownership appeared, please state the real beneficial ownership.

8. Was any part of the Dallas judgment in favor of the
176 American Exchange Bank ever paid if so when and by whom was it paid, was it not paid in February 1892 by you to the sheriff of Bowie County Texas on an execution which the sheriff at the time held against you and others.

9. The suit at Dallas was based on a note for $884.90 dated Aug. 6 1891 due 90 days, signed "Union Lumber Mills Co." by D. J. Grigsby, endorsed "Southern Pine Lumber Company" T. L. L. Temple also endorsed by as an individual, who obtained the money for which this note was given.

10. Is it not a fact that at that time you and D. J. & G. M. D. Grigsby composed the firm of Union Lumber Mills Company, and that you owned about one third of same, and when that note was given you got the money on it, and that the Grigsbys were to get their proportional amount in the same way, that is the Union Lumber Mills Company was to give its note, and the Grigsbys were to sign the notes individually for the money they received, and you were to sign individually for the money you received.

11. It appears that judgment was rendered for plaintiff American Exchange Bank in the suit at Guthrie in 1895 and that real

estate was sold under said judgment in Guthrie and in Oklahoma City, what was done with the money obtained at said sale.

12. Who were the real owners of the lots sold under said judgment.—Did they belong to you J. D. & G. M. D. Grigsby, if so in what proportions.

13. Did the papers or facts in the suit at Guthrie show any portion of the Dallas judgment had been paid.

14. Is it not a fact that you employed the lawyers at Guthrie to file that suit No. 1524 and that you paid all expenses of same.

15. Did you have the right to collect from the Grigsbys the entire amount of the judgment recovered at Dallas.

16. Is it not true that that judgment was due primarily from the Union Lumber Mills Co. and that you were a part owner of
177 said Union Lumber Mills Company and owed a proportionate part of its debts.

17. Was the property in question deeded to you and the Grigsbys as members of the partnership the Union Lumber Mills Company was it paid for with partnership or separate funds.

18. When was the Southern Pine Lumber Co. first organized as a partnership and who then composed it, then, and when did each of these parties withdraw from or get out in any way.

19. When was it formed into a corporation in Arkansas, and who then owned the stock and when did each get out of it.

20. When was it incorporated under the Texas law, and who then owned the stock and when did they get out.

21. Have you at all times owned a controlling interest in the Southern Pine Lumber Co. both as a corporation and a partnership.

22. Is it not a fact that you have all the time had full and complete control of the Southern Pine Lumber Co. both as a corporation and as a partnership.

23. Is it not a fact that the interest held by the other persons was merely nominal.

T. L. L. TEMPLE, being duly sworn, makes the following answers:

Answer to Interrogatory One. As manager of the Southern Pine Lumber Company, a corporation organized under and by virtue of the laws of the State of Texas, I caused a certain suit to be instituted upon a foreign judgment at Guthrie, Oklahoma, against the Union Lumber Mills Co. and the Southern Pine Lumber Co. a co-partnership.

Answer to Interrogatory Two. I do not recollect of having any conference or consultation with the American Exchange Bank.

Answer to Interrogatory Three. I do not now remember
178 who transferred the account referred to to the American Exchange Bank, and do not think there was any trade made with the Bank upon which the transfer was based. The Southern Pine Lumber Co., incorporated in the State of Texas, was the owner of said account. This to the best of my recollection.

Answer to Interrogatory Four. To the best of my knowledge the fourth interrogatory is answered by my answer to the third interrogatory.

Answer to Interrogatory Five. My answer to the third interrogatory covers the fifth interrogatory.

Answer to Interrogatory Six. The Southern Pine Lumber Company as an Arkansas corporation, was in no wise indebted to the American Exchange Bank, and I do not know that I could say why the Southern Pine Lumber Co. as an Arkansas corporation was made the defendant in said suit, unless it was because they became the possessor or owner of all the assets of the partnership known as the Southern Pine Lumber Company.

Answer to Interrogatory Seven. I do not know that I exactly understand the question, but will try to make my answer full in this way. The stock and property of the Southern Pine Lumber Co., a partnership, was owned by Benjamin Whitaker and T. L. L. Temple. I cannot now state when this partnership was wound up. About the time of the winding up of the Southern Pine Lumber Co. partnership a corporation was formed in Arkansas under the same name and of that corporation I owned the majority of the stock.

Answer to Interrogatory Eight. It was paid to the Sheriff of Bowie County about the time mentioned, by the Southern Pine Lumber Co.

179 Answer to Interrogatory Nine. (Not offered by the cross-petitioners, Grigsby Bros. but letter offered in evidence by the defendants Southern Pine Lumber Company and Chinn and Chinn.)

Answer to Interrogatory Ten. I was supposed to own one-fifth interest at that time. The balance of this interrogatory is answered in Interrogatory Nine.

Answer to Interrogatory Eleven. The property was sold in Guthrie and Oklahoma City and bought in by the Southern Pine Lumber Co., a corporation existing under and by virtue of the laws of the State of Texas, who were the beneficiaries under said judgment. I think for a sum less than $1000.00 less than the amount recovered on the judgment in favor of the American Exchange Bank, independent of the judgment on open account.

Answer to Interrogatory Twelve. I did not personally have anything to do with the purchase of the real estate owned by the Union Lumber Mills Company but have been advised that the title was executed to D. J. and G. M. D. Grigsby for four-fifths interest and to T. L. L. Temple, this testifying witness, for one-fifth interest. The records will show the real interest as conveyed, and part of the property was owned in connection with others.

Answer to Interrogatory Thirteen. I really could not answer this interrogatory. I never saw the papers that were filed to my recollection and was never present at any court proceeding had thereon.

Answer to Interrogatory Fourteen. It is not a fact that I employed the lawyers at Guthrie to file that suit, #1524, and that I paid the expenses of same, but it is a fact that the Southern Pine Lumber Company, a Texas corporation, did so.

Answer to Interrogatory Fifteen. The Southern Pine Lumber Company, a Texas corporation, did have the right to collect from the Grigsby Brothers and myself, or in other words from the Union

Lumber Mills Company the entire amount of the judgment recovered at Dallas, and my individual property was made responsible for that debt in proportion to my interest in said Union Lum-
180 ber Mills Company, the same as the Grigsbys, and did respond the same as theirs in the judgment and sale.

Answer to Interrogatory Sixteen. It is true that the judgment was due primarily from the Union Lumber Mills Co. and that I was a partner in said company.

Answer to Interrogatory Seventeen. The property in question, as I have answered was, I think, deeded to us as individuals in the stated proportion as we were interested in the partnership, and my understanding is, and was at the time, that it was paid for with partnership funds.

Answer to Interrogatory Eighteen. The Southern Pine Lumber Company, partnership, was first organized in the fall of the year 1899 and was composed of Benjamin Whitaker, T. L. L. Temple and C. M. Putnam. I do not now remember the dates that any of the partners withdrew.

Answer to Interrogatory Nineteen. The Southern Pine Lumber Co. a corporation in Arkansas was formed sometime in the fall of the year 1892.

Answer to Interrogatory Twenty. It was never incorporated under the Texas law, but went into liquidation in Arkansas sometime during the year 1893 when a new corporation was organized in Texas under the same name and composed of different stockholders, at least some of them.

Answer to Interrogatory Twenty-One. I have always owned a majority of the stock in the corporation but did not have a controlling interest in the partnership.

Answer to Interrogatory Twenty-Two. It is not a fact that I have at all times had full and complete control of the Southern Pine Lumber Co. both as a corporation and as a partnership.

181 Answer to Interrogatory Twenty-Three. I do not exactly understand what you mean by nominal. The other parties owned their stock, and in aggregate the amount of stock owned by others would amount to Twenty-Five Thousand Dollars.

T. L. L. TEMPLE.

To each of which foregoing questions and answers with the exception of Answer to question No. 9, the defendants Southern Pine Lumber Co. and Chinn and Chinn object as incompetent, irrelevent and immaterial, which objection was by the Court Overruled, to which said defendants excepted.

The cross-petitioners offer in evidence the first interrogatory and the answer thereto in a certified copy of the deposition of T. L. L. Temple taken in the suit at Jefferson, Texas,—Objected to as incompetent, irrelevent and immaterial, not being the testimony of a witness or deposition taken in this case, and not between the same parties, which objection was by the Court overruled, to which said defendants, The Southern Pine Lumber Company and Chinn and Chinn except.

Objected to on the further ground that said cross-petitioners are seeking to impeach their own witness by outside testimony, which objection was also by the Court overruled, to which said defendants excepted.

Said Interrogatory and answer are as follows:—

1st. What relation did you hold toward the Southern Pine Lumber Company in 1891 and 1895 and at the present time? If you held any office in said Company, please state what it was and what your duties required of you?

Answer to Interrogatory One. The Southern Pine Lumber Company was organized in 1889, as a partnership. I was a mem-
182 ber of that firm, in October, 1891, this business was incorporated under the laws of the State of Arkansas, under the corporate name of Southern Pine Lumber Company. I was its president. In 1892 a corporation was organized under the laws of the State of Texas, under the corporate name of Southern Pine Lumber Company, and I was also president of that Company and am now its president. From April 1891 to October 1891, when the Arkansas corporation was formed, I was the exclusive owner and operator of the business known as Southern Pine Lumber Company."

The cross-petitioners, Grigsby Bros. offer in evidence the Articles of Incorporation of the Southern Pine Lumber Company, dated the 24th day of September, 1892, in the State of Arkansas, and there being no objection, the same are as follows:—

183 *Articles of Agreement and Incorporation of the Southern Pine Lumber Company.*

Know all men by these presents: That the Corporators hereinafter named have this day, and by these presents, formed a Corporation under and in pursuance of the laws of the State of Arkansas, in that behalf provided, for "Incorporations for manufacturing and other lawful business," and in evidence thereof do hereby execute the following Articles of Incorporation:

First. The name of said Corporation shall be—Called and known as The Southern Pine Lumber Company.

Second. The Corporators are as follows viz: T. L. L. Temple, T. A. Patillo and F. W. Offenhauser and O. A. Mason.

Third. The place of business is to be located in Miller County Arkansas and its office for transaction of business shall be in the City of Texarkana or at such other place as the Board of Directors may select.

Fourth. The general nature of the business proposed to be transacted by this corporation is to manufacture lumber, buy and sell timber and lumber, deal in general merchandise and such other lawful business as the Directors of the corporation may deem advantageous and profitable.

Fifth. The amount of the capital stock of said Corporation shall be Twenty-five Thousand Dollars; all of which has been subscribed by the Corporators aforesaid.

Sixth. The said capital stock shall be divided into One Thousands shares of the value of Twenty-five dollars each.

Seventh. The affairs and business of the Corporation shall be conducted and controlled by a Board of Directors, consisting
184 of three members, all of whom shall be stockholders of the Corporation. Said Board of Directors shall elect one of its members as President, and one of its members as Vice-President, and shall also elect a Secretary and Treasurer.

Eight. The first election of Directors shall be held immediately after the organization of the Corporation, and said Directors shall serve for one year and until their successors are elected.

Ninth. The Board of Directors are empowered to ordain and establish all by-laws and regulations necessary to the management and business of said Corporation, and alter and repeal same at pleasure.

Tenth. The first meeting of said corporation for organization shall be held in Texarkana, Arkansas, at the office of J. D. Cook at 4 o'clock P. M. on September 23rd, 1892. The subscribers hereto hereby waive notice of said meeting.

In testimony whereof, we have hereunto set our hands, on this, 23rd day of September, 1892.

T. L. L. TEMPLE.
F. W. OFFENHAUSER.
T. A. PATILLO.
O. A. MASON.

Certificate.

Whereas, T. L. L. Temple, T. A. Patillo, F. W. Offenhauser, O. A. Mason have associated themselves together as a body politic and corporate, to be known as the Southern Pine Lumber Company.

And whereas, the said Corporators, being the subscribers to the capital stock of the said Corporation, have waived the fifteen days' notice as required by law and called a meeting for organization, to be held in the city of Texarkana, Arkansas, at the office of
185 J. D. Cook at 4 o'clock P. M. on the 23rd day of September, 1892.

Whereas, at the time and place above set out, a meeting of the subscribers aforesaid was held to organize said Corporation and elect —— Directors; and,

Whereas, at said meeting the following gentlemen were elected Directors, to-wit: T. L. L. Temple, T. A. Patillo, F. W. Offenhauser and O. A. Mason and

Whereas, at a meeting of the said Board of Directors T. L. L. Temple was elected President, and F. W. Offenhauser was elected Secretary, and F. W. Offenhauser was elected Treasurer.

Now, therefore, the said T. L. L. Temple as President, and the said F. W. Offenhauser, T. A. Patillo and O. A. Mason as Directors, do in pursuance of law, issue this, their Certificate, verified by their oaths, and do hereby certify as follows:

First. Said Corporation is formed for the purpose of manufacturing

lumber, buying and selling timber and lumber dealing in general merchandise and such other lawful business as the directors of the corporation may deem advantageous and profitable.

Second. Its Capital Stock is Twenty-five Thousand ($25,000.00) Dollars, divided into shares of Twenty-five dollars ($25.00) each.

Third. Twenty-five Thousand Dollars of said capital stock have been actually paid in by the subscribers hereto.

Fourth. The names of the stockholders and the number of shares owned by them, respectively, *is* as follows:

Names.	No. of shares.
T. L. L. Temple	Nine hundred and ninety seven.
F. W. Offenhauser	One share
T. A. Patillo	One share
O. A. Mason	One share

186 In Testimony Whereof, The said T. L. L. Temple President of the said Corporation, and T. A. Patillo, F. W. Offenhauser and O. A. Mason a majority of the Board of Directors of said Corporation, have hereunto set their hands on this 23rd day of September A. D. 1892.

T. L. L. TEMPLE, *President.*
F. W. OFFENHAUSER,
T. A. PATILLO,
O. A. MASON, *Directors.*

STATE OF ARKANSAS, *County of Miller, ss:*

On their oaths say that the matters and things in the foregoing certificate set out are true, to the best of their knowledge and belief.

(Signed) T. L. L. TEMPLE,
F. W. OFFENHAUSER.
T. A. PATILLO.
O. A. MASON.

Subscribed and sworn to before me this, 23rd day of September, 1892.

In Testimony Whereof, I have hereunto set my hand and seal of office.

[SEAL.] A. M. GARRISON,
Notary Public, Miller Co., Ark.

My com. ex. Nov. 23rd, 1893.

Articles of Agreement and Incorporation of the Southern Pine Lumber Company.—Filed in Office of the Secretary of State of Arkansas, this 24th day of Sept. 1892. B. B. Chism, Secretary of State, by H. B. Armistead, Deputy. Recorded in Vol. 2 Record 9 for Articles of Association at Page 511, this 22nd day of M'ch, 1893. H. B. Armistead, Secretary of State, by Joe Moore, Chief Clerk.

187 STATE OF ARKANSAS, *ss:*

I, John W. Crockett, Secretary of State of the State of Arkansas, do hereby certify that the foregoing is a true and correct copy of the articles of incorporation of the Southern Pine Lumber Company the original of which was filed for record in this office on the 24 day of Sept., 1892.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal. Done at the City of Little Rock, this 29th day of November, 1901.

[SEAL.] JNO. W. CROCKETT,
Secretary of State.

Said cross-petitioners, Grigsby Bros. also introduce in evidence the articles of incorporation of the Southern Pine Lumber Company, dated October 18, 1893, in the State of Texas, and there being no objection, the same are as follows:

188 *Articles of Incorporation.*

Article 1.

The name of this incorporation shall be the Southern Pine Lumber Company.

Article 2.

The purposes of this corporation is to manufacture, buy, sell and trade in all kinds of lumber and timber.

Article 3.

The principal office of this company is located in Texarkana, Bowie county, Texas.

Article 4.

The period of existence of this incorporation shall be twenty five years from the date of filing and approval of these articles as required by law.

Article 5.

The names and number of directors and those appointed for the first year: Wm. Temple, Fulton, Arkansas; T. L. L. Temple, Miller county, Arks.; J. M. Park, Miller Co., Ark.; H. C. Hynson, Texarkana, Bowie County, Texas; E. Estabrook, Texarkana, Bowie County, Texas; E. F. Kane, Texarkana, Bowie County, Texas.

Article 6.

The capital stock shall be fifty thousand dollars, divided into Two thousand shares of twenty five dollars each.

In Testimony whereof, we Wm. Temple, T. L. L. Temple, J. M. Park, H. C. Hynson, E. Estabrook and E. F. Kane hereto sign our names this 18th day of October, 1893.

T. L. L. TEMPLE.
WM. TEMPLE.
J. M. PARK.
H. C. HYNSON.
E. ESTABROOK.
E. F. KANE.

189 THE STATE OF TEXAS, *County of Bowie:*

Personally appeared before me the undersigned authority, H. C. Hynson, E. Estabrook and E. F. Kane, all and each of whom are residents citizens of Bowie county, Texas, and to me well known, — upon oath say they signed the foregoing articles for the purposes therein expressed.

Witness my hand and seal of Office this 18th day of October, A. D. 1893.

W. E. ESTES,
[SEAL.] *Notary Public of Bowie County, Texas.*

(Endorsed:) Charter of the Southern Pine Lumber Company Filed in Department of State October 19th, 1893. Geo. W. Smith, Secretary of State.

(Seal State of Texas.)

DEPARTMENT OF TEXAS.

I, John G. Tod, Secretary of State of the State of Texas, do hereby certify that the foregoing is a true copy of the Original Charter of Southern Pine Lumber Company with the endorsements thereon, as now appears of record in this Department. Witness my official signature, and the Seal of State affixed, at the City of Austin, this 29th day of November A. D. 1901.

[SEAL.] JOHN G. TOD,
Secretary of State.

Endorsed: Texas S. P. L. Co. Oct. 18-19-1893.

190 Said cross-petitioners, Grigsby Bros. offer in evidence the deposition of WALKER HILL.—

The defendants, Southern Pine Lumber Company and Chinn and Chinn, object for the reason that the same is incompetent, irrelevant and immaterial and seeking to collaterally attack a judgment which objection was by the Court overruled, to which said defendants excepted.

The same is as follows:

Interrogatory 1. What business relationship do you hold in reference to the American Exchange Bank?

A. I am president of the American Exchange Bank.

Interrogatory 2. It appears that about January, 1892, you through McCormick & Spence, Attorneys at Dallas, Texas, filed suit on a note for $884.90 given by "Union Lumber Mills Company" endorsed by Southern Pine Lumber Co. and T. L. L. Temple. It also appears that you recovered judgment. Please state if that judgment or any part of it has been paid, if so when was it paid?

A. I do not know whether or not the judgment or any part of it has ever been paid. McCormick and Spence, Attorneys, represented us in a great deal of litigation that we had down in that part of the country, and they could tell whether or not the judgment or any part of it was ever paid. I have no books here which would give the information desired.

Interrogatory 3. It appears that in 1894 a suit was filed in Guthrie, Oklahoma, in the name of the American Exchange Bank, alleging said judgment was unpaid, and seeking to recover the amount named therein, also alleging that an account of $294.56 had been transferred on January 1st, 1894 by the Southern Pine Lumber Company to American Exchange Bank; said account was
191 against the Union Lumber Mills Company. Please state if said Bank authorized said suit to be filed, and if the American Exchange Bank ever received any of the proceeds of property sold under the judgment obtained there; if so when and how much?

A. I do not know. McCormick and Spence, our attorneys at Dallas, Texas, can give all that information. The only people we ever gave authority to sue on this claim was McCormick & Spence. They could, however, have delegated this authority to some one else, but I have no knowledge of their doing so.

Interrogatory 4. Was the account for $294.56 against the Union Lumber Mills Co. ever transferred to said American Exchange Bank; if so when and by whom and how much did your Bank pay for the account, and why did you buy it?

A. I do not know, and in addition I do not remember having bought any claim after judgment was obtained.

Interrogatory 5. If the American Exchange Bank had given authority to any one to file suit at Guthrie, would you have known it? Give your means of knowing.

A. We would not have known except through McCormick and Spence. They had full power to do whatever they chose to collect the money. As I stated in reply to Interrogatory No. 3, the only persons to whom we ever gave authority to file suit in this claim was McCormick & Spence.

Interrogatory 6. Would you have known if at any time the account for $294.56 had been transferred to your bank?

A. I think I would.

Interrogatory 7. When did you first learn that a suit had been filed at Guthrie in the name of American Exchange Bank, and how did you learn it?

192 A. I learned that in the last year through some attorney. I believe the attorney's name was F. H. Prendergast. He wrote to me in reference to some of these suits.

WALKER HILL.

The cross-petitioners, Grigsby Brothers, offer in evidence the petition in the suit at Guthrie, Oklahoma, of the American Exchange Bank *vs.* T. L. L. Temple, *et al.*, for two purposes, to show that it was a suit against the Union Mills Lumber Company and not the Union Lumber Mills Company.

Second: For the purpose of showing that there is an affidavit that the petition is true, and then there is an affidavit for the attachment.

To which the defendants, Southern Pine Lumber Company and Chinn and Chinn object as incompetent, irrelevant and immaterial, which objection was by the Court overruled, to which the said defendants excepted.

The same is as follows:

In the District Court of the First Judicial District of Oklahoma Territory, Holding Terms at Guthrie for Logan County.

THE AMERICAN EXCHANGE BANK, a Corporation Organized Under the Laws of the State of Missouri, Plaintiffs,

vs.

T. L. L. TEMPLE and BEN WHITTAKER, Partners of the Southern Pine Lumber Company; THE SOUTHERN PINE LUMBER CO., a Corporation Organized under the Laws of the State of Arkansas, and D. J. GRIGSBY, G. M. D. GRIGSBY, and T. L. L. TEMPLE, Partners under the Firm Name and Style of the Union Mills Lumber Co., Defendants.

193 Comes the plaintiffs, the American Exchange Bank of St. Louis, Mo. and, by leave of the court first had and obtained, files this its amended complaint in this cause and states that it is now and was, at all times hereinafter mentioned, a corporation, duly organized under the laws of the state of Missouri;

That the defendants, the Southern Pine Lumber Company, is a corporation organized under the laws of the state of Arkansas;

That the defendants, T. L. L. Temple and Ben Whittiker were, on and prior to the 9th day of January, 1892, partners doing business under the firm name and style of the Southern Pine Lumber Company and that they afterwards incorporated under the laws of the state of Arkansas, as the Southern Pine Lumber Company;

That the defendants D. J. Grigsby and T. L. L. Temple were, at the times hereinafter mentioned, a co-partnership doing business under the firm name and style of the Union Mills Lumber Company.

Plaintiff further states, as its first cause of action, that on January 19th, 1892, it recovered a judgment in the District Court of the County of Dallas, state of Texas against the defendants, T. L. L. Temple and Ben Whittiker, partners as the Southern Pine Lumber Company and D. J. Grigsby and G. M. D. Grigsby and T. L. L. Temple, partners as the Union Mills Lumber Company, for the sum of One Thousand and Twenty-Two and 38 100 ($1022.38) dollars, which bears interest at the rate of twelve (12) per cent. per annum

from the date of such judgment until paid, and for the further sum of forty and 45 100 ($40.45) dollars, as the cost of said suit, which bears interest at the rate of six (6) per cent. from the date of said judgment, until paid; and that said judgment is now due and unpaid. Copies of which judgment and bill of costs are filed herewith and asked to be made a part of this complaint.

For its second cause of action plaintiff states, that after the recovery of said judgment and prior to November 19th, 1892, the Southern Pine Lumber Company, composed of T. L. L. Temple and Ben Whittiker formed a corporation of their business under the laws of the state of Arkansas, under the name of the Southern
194 Pine Lumber Company and that all the notes and accounts and books of the Southern Pine Lumber Company were transferred and delivered to the Southern Pine Lumber Company, a corporation;

That on the 21st day of November, 1892, D. J. Grigsby, G. M. D. Griggsby and T. L. L. Temple, partners as the Union Mills Lumber Company were indebted to T. L. L. Temple and Ben Whittaker, partners as the Southern Pine Lumber Company in the sum of Two Hundred and ninety-four and 56 100 ($294.56) dollars, upon an open account a copy of which is filed, herewith, and asked to be taken as a part of this complaint, with interest thereon at six (6) per cent. per annum from December 23rd, 1891;

That on the — day of —, 1893, T. L. L. Temple and Ben Whittiker, partners as the Southern Pine Lumber Company transferred and delivered said account to the defendants the Southern Pine Lumber Company, a corporation;

That on the 1st day of January, 1894, the defendants, the Southern Pine Lumber Company, a corporation, transferred and delivered said account to the plaintiff herein and that there is now due on said account said sum of two hundred and ninety-four and 56 100 ($294.56) Dollars with interest thereon at the rate of six (6) per cent. from December 23rd, 1891, until the present time.

Wherefore, plaintiff prays judgment for the said sum of One Thousand and twenty-two and 38 100 ($1022.38) Dollars with twelve (12) per cent. interest thereon from the 9th day of January, 1892, and for the further sum of forty and 45 100 ($40.45) Dollars with six (6) per cent. interest thereon from the said 9th day of January, 1892, and, for the further sum of Two Hundred and ninety-four and 56 100 ($294.56) dollars with six (6) per cent. interest thereon from July 23rd, 1893, and for the aggregate
195 amount, not including interest, One Thousand and three hundred fifty-six and 94 100 ($1356.94) Dollars, and for other relief.

CUNNINGHAM & DE BOIS,
Attorneys for Plaintiff.

TERRITORY OF OKLAHOMA, *County of Logan*, ss:

G. S. Cunningham, being duly sworn, deposes and says that he is the attorney for the plaintiff, the American Exchange Bank of St.

Louis, Mo. that he had read the foregoing complaint and knows the contents thereof and that the statement- therein contained are true.

G. S. CUNNINGHAM.

Subscribed and sworn to before me on this the 14 day of November, 1894.

F. L. McCOY,
Notary Public.

My commission expires July 24th, 1898.

In the District Court of the First Judicial District of Oklahoma Territory, Holding Terms at Guthrie for Logan County.

THE AMERICAN EXCHANGE BANK, a Corporation Organized under the Laws of the State of Missouri, Plaintiffs,

vs.

T. L. L. TEMPLE and BEN WHITTIKER, Partners as the Southern Pine Lumber Co.; THE SOUTHERN PINE LUMBER CO., a Corporation Organized under the Laws of the State of Arkansas, and D. J. GRIGGSBY, G. M. D. GRIGGSBY and T. L. L. TEMPLE, Partners under the Firm Name and Style of the Union Mills Lumber Co., Defendants.

196 G. S. Cunningham, being duly sworn deposes and says that he is the attorney for the plaintiff in the above entitled action, who is absent from the Territory of Oklahoma;

That said plaintiff has commenced an action for the recovery of the sum of One thousand and twenty-two and 38 100 ($1022.38) dollars, with twelve (12) per cent. interest thereon from the 9th day of January, 1892, until the present time, which is evidenced by a judgment, and, for the further sum of Forty and 45/100 ($40.45) dollars the cost of said action with six (6) per cent. interest thereon from the said 9th day of January, 1892 and for the further sum of two hundred and ninety-four and 56 100 ($294.56) dollars with six (6) per cent. interest thereon from December 23, 1891 upon an open account against the defendants, T. L. L. Temple and Ben Whittaker, partners as the Southern Pine Lumber Co. and D. J. Griggsby, G. M. D. Griggsby and T. L. L. Temple, partners under the firm name and style of the Union Mills Lumber Company;

That said defendants are indebted to said plaintiffs in the aggregate not including interest, in the sum of One Thousand Three Hundred and sixty-five and 94 100 ($1365.94) dollars; that said claim is just due and unpaid and that affiant believes that said plaintiff ought to recover from said judgment said sum of One Thousand Three Hundred and sixty-five and 94 100 ($1,365.94) Dollars, and interest thereon as above stated;

That the defendants, the Southern Pine Lumber Company is a foreign corporation and that all of the other defendants are non-residents of this Territory.

G. S. CUNNINGHAM.

Subscribed and sworn to before me on this the 14 day of November, 1894.

F. L. McCOY,
Notary Public.

My commission expires July 24th, 1898.

197 In the District Court of the First Judicial District of Oklahoma Territory, Holding Terms at Guthrie for Logan County.

THE AMERICAN EXCHANGE BANK, a Corporation Organized under the Laws of the State of Missouri, Plaintiffs,

vs.

T. L. L. TEMPLE and BEN WHITTIKER, Partners as The Southern Pine Lumber Company; THE SOUTHERN PINE LUMBER COMPANY, a Corporation Organized under the Laws of the State of Arkansas, and D. J. GRIGGSBY, G. M. D. GRIGGSBY, and T. L. L. TEMPLE, Partners under the Firm Name and Style of the Union Mills Lumber Co., Defendants.

G. S. Cunningham, being duly sworn, deposes and says that he is the attorney for the plaintiffs in the above entitled cause, who is absent from Oklahoma Territory; That plaintiffs cannot obtain service of summons upon the defendants in this cause, and this cause is a suit based upon a judgment recovered by the plaintiff against the defendants in the District Court of the County of Dallas, State of Texas on the 9th day of January, 1892 and for costs and upon an open account.

G. S. CUNNINGHAM.

Subscribed and sworn to before me on this the 14th day of November 1894.

F. L. McCOY,
Notary Public.

My commission expires July 24th, 1898.

The words "with due diligence" as they appeared in the original were in typewritten print and had a pen and ink mark drawn through the three words erasing them.

Endorsed: 1524—The American Bank—Plaintiffs *vs.* T. L. L. Temple, Ben Whittiker, partners a- Southern Pine Lumber Company. The Southern Pine Lumber Co. a corporation, D. J.
198 Griggsby, G. M. D. Grigsby, T. L. L. Temple, Partners as Union Mills Lumber Co.—Filed Dec. 17, 1894. Louis E. Pitts, Clerk. Cunningham & De Bois, Atty's for Plaintiffs.

The cross-petitioners, Griggsby Bros. offer in evidence publication notice and proof of publication thereof, dated the 8th day of January, 1895.

The defendants, Southern Pine Lumber Company and Chinn and Chinn, object as incompetent, irrelevant and immaterial, which objection was by the Court overruled, to which said defendants excepted.

The same is as follows:

Copy.

First published in Oklahoma Leader Jan. 10, 1895.

Notice.

In the District Court of Logan County, Oklahoma Territory.

AMERICAN EXCHANGE BANK OF ST. LOUIS, a Corporation Organized under the Laws of the State of Missouri, Plaintiffs,

vs.

T. L. L. TEMPLE, BENJ. WHITTAKER, Partners as Southern Pine Lumber Co.; THE SOUTHERN PINE LUMBER CO., a Corporation Organized under the Laws of the State of Arkansas; D. J. GRIGSBY, G. M. D. GRIGSBY, T. L. L. TEMPLE, Partners Doing Business under the Firm Name and Style of Union Lumber Mills Co., Defendants.

To the above named defendants:

You are hereby notified that you have been sued by the American Exchange Bank, of St. Louis a corporation organized under the laws of the state of Missouri, and that an attachment bond and an affidavit of attachment have been filed in said court and that a writ of attachment has been issued by the clerk of said court di-
199 rected to C. H. De Ford, sheriff of Oklahoma county, Oklahoma territory, in said cause and levied upon the one-fifth undivided interest of the Southern Pine Lumber Co., as a partnership and as a corporation and an undivided four-fifths interest of D. J. Grigsby and G. M. D. Grigsby, and all the interest of T. L. L. Temple and all the interest of D. J. Grigsby and G. M. D. Grigsby and T. L. L. Temple, partners as the Union Lumber Mills Co. in and to lots 17, 18, 19, 20 and 21 in block 60, in Oklahoma City, Oklahoma County, Oklahoma territory; that another writ of attachment has been issued in said cause and directed to W. W. Painter, sheriff Logan County, Oklahoma Territory, and that he has levied the same upon the one-fifth interest of the Southern Pine Lumber company, as a partnership and as a corporation, and the undivided four-fifths interest of D. J. Grigsby and G. M. D. Grigsby and all the interest of T. L. L. Temple, also all the interest of D. J. Grigsby and G. M. D. Grigsby and T. L. L. Temple, partners as the Union Lumber mills company, in and to lots 4, 5, 6, 7, and 21 in block 43, Guthrie proper, Logan county, Oklahoma Territory, and also the undivided one-tenth interest of the Southern Pine Lumber Company as a partnership, and as a corporation and the four-tenths undivided interest of D. J. Grigsby and G. M. D.

Grigsby and all the interest of T. L. L. Temple and all the interest of D. J. Grigsby, D. M. G. Grigsby and T. L. L. Temple, partners as the Union lumber mills Co. in and to lot 9 in block 54 in Guthrie Proper, and lots 11 and 12 in block 42, and lot 15 in block 51 in East Guthrie, and that unless you appear and answer said action on the 23rd day of February, 1895, judgment will be rendered against you for the sum of one thousand five hundred and fifty-four and 58/100 dollars, for which amount said suit has been brought and interest and cost and an order and judgment will be obtained in said court sustaining said attachment and the above described property will be ordered sold to satisfy the indebtedness above mentioned, interest and cost that will then be due.

200 In witness whereof I have hereunto set my hand and affixed the seal of said court at my office in Guthrie, in said county, this 8th day of January, 1895.

[SEAL.] LOUIS E. PITTS, *Clerk.*

TERRITORY OF OKLAHOMA, *Logan County, ss:*

H. A. Platt of lawful age, being first duly sworn, depose and sayeth that he is the mgr. of the Oklahoma Leader a newspaper printed and published in Logan County, Territory of Oklahoma, and that a notice of which a true copy is hereto attached, was published in the regular and entire issue of each number of said Oklahoma Leader for 6 consecutive weeks the first publication being made as aforesaid on the 10 day of Jany., A. D. 1895, and the last on the 14 day of Feby., A. D. 1895.

H. A. PLATT.

Subscribed and sworn to before me this 19 day of Feby., A. D. 1895.

[SEAL.] FRANK B. LUCAS,
Notary Public.

My commission expires Feb. 7, 1898.

Received of —— the sum of twenty two & 50/100 Dollars the printers fee in full for publishing the above.

H. A. PLATT.

Feby. 20, 1895.

The cross-petitioners, Grigsby Bros. offer in evidence the judgment of March 2, 1895, entered in cause No. 1524, in the district court of Logan County.

The defendants Southern Pine Lumber Co. and Chinn and Chinn object as incompetent, irrelevant and immaterial, which objection was by the Court overruled, to which said defendants excepted.

The same is as follows:—

201 In the District Court in and for Logan County, Oklahoma Territory.

AMERICAN EXCHANGE BANK OF ST. LOUIS, a Corporation Duly Incorporated under the Laws of Missouri, Plaintiff,

vs.

T. L. TEMPLE, BENJAMIN WHITTAKER, Partners as the Southern Pine Lumber Company, and THE SOUTHERN PINE LUMBER COMPANY, a Corporation Organized under the Laws of the State of Arkansas, and D. J. GRIGSBY and G. M. D. GRIGSBY, and T. L. L. TEMPLE, Partners, Doing Business under the Firm Name and Style of Union Lumber Mills Company.

Judgment.

On this the 2nd day of March, 1895, it being one of the term days of the February Term of 1895 of the District Court in and for Logan County, Oklahoma Territory, comes the plaintiff by its attorneys, and submits to the court the pleadings and proof, the attachment and services; It appearing to the satisfaction of the court that on the 21st day of November, 1892, D. J. Grigsby and G. M. D. Grigsby and T. L. L. Temple, partners of the Union Lumber Mills Company, are debtors to T. L. L. Temple and Ben Whittaker, partners of the Southern Pine Lumber Company, in the sum of Two Hundred and Ninety-four Dollars and fifty-six cents ($294.56), which was afterwards assigned and transferred and delivered to the defendants, the Southern Pine Lumber Company.

That on the 1st day of January, 1894, the defendants, the Southern Pine Lumber Company, a corporation, transferred and delivered said account to the plaintiff herein, and that there is now due on said account said sum of Two Hundred and Ninety-four dollars and fifty-six cents, and interest thereon at the rate of six per cent. from December the 23rd, 1891.

This court further finds that on the 19th day of January, 1892, the plaintiff herein obtained a judgment in the District Court in the County of Dallas and State of Texas, against the defendants

202 T. L. L. Temple and Ben Whittaker, partners of the Southern Pine Lumber Company, and D. J. Grigsby and G. M. D. Grigsby, and T. L. L. Temple, partners as the Union Lumber Mills Company for the sum of Ten hundred and twenty-two dollars and thirty-eight cents ($1022.38), which bears interest at the rate of twelve per cent. per annum from the date of said judgment until paid, and for the further sum of forty dollars and forty-five cents (40.45) as the costs of said suit which bears interest at the rate of six per cent. from the date of said judgment, all of which several debts are now due and unpaid.

It is therefore considered, ordered and adjudged that the plaintiff have and recover of the defendants herein named the sum of Eighteen hundred and two *dollars* and 24/100 Dollars ($1802.24) the same being principal and interest due on said debt, and it further

appearing to the satisfaction of the court that on the 22nd day of December, 1894, there was duly issued from the clerk of the district court of Logan County, Oklahoma Territory, a writ of attachment in favor of the plaintiff against the defendants, directed to the sheriff of Logan County, Oklahoma Territory, which was served by said sheriff by attaching the following described property in the city of Guthrie, in the county of Logan, Territory of Oklahoma, namely:

As a partnership and as a corporation, the undivided 4/5 interest belonging to D. J. Grigsby and G. M. D. Grigsby, and all the interest of T. L. L. Temple, also, all the interest of D. J. Grigsby and G. M. D. Grigsby and T. L. L. Temple, partners as the Union Lumber Mills Company, in and to lots 4-5-6-7- and 21 in block 43, Guthrie Proper, also, one undivided 1/10 interest of the Southern Pine Lum-
203 ber Company in said lots as a partnership, and as a corporation, and the 4/10 undivided interest belonging to D. J. Grigsby and G. M. D. Grigsby, and all the interest of T. L. L. Temple, and all the interest of D. J. Grigsby and G. M. D. Grigsby, and T. L. L. Temple, partners as the Union Lumber Mills Company, in and to lot 9 in block 54, Guthrie Proper, and lot 15 in block 51 in East Guthrie, all of which property was duly appraised according to law and said writ of attachment and appraisement properly returned and filed in this court.

And it further appearing to the satisfaction of the court that on said 22nd day of December, 1894, another writ of attachment was duly issued from this court directed to the Sheriff of Oklahoma County, which was by him, said Sheriff, duly levied upon the following described property located in the City of Oklahoma, County of Oklahoma, and Territory of Oklahoma, namely:

Upon 1/5 undivided interest belonging to the Southern Pine Lumber Company, as a partnership and as a corporation, an undivided 4/5 interest as the property of D. J. Grigsby and G. M. D. Grigsby and all the interest of T. L. L. Temple, and all the interest of D. J. Grigsby and G. M. D. Grigsby and T. L. L. Temple, partners as the Union Lumber Mills Company, in and to lots 17, 18, 19, 20 and 21 in block 60, which was caused by said sheriff to be duly appraised, which writ of attachment and appraisement has been duly returned and filed in this court.

And it further appearing to the satisfaction of the court that notice by publication has been duly made and published, the proof of which has been filed in this court according to law, warning said defendant to appear and answer said complaint, and further warning said defendants that said interest as heretofore named *have* been attached, both in Logan and Oklahoma Counties, and, defendants
204 wholly making default, it is by the court considered, ordered and adjudged that the several attachments herein named be sustained, and the Sheriff of Logan County is directed, according to law, to advertise and sell the property herein attached located in Logan County for the payment of said debt. And the Sheriff of Oklahoma County is directed to advertise and sell, according to law, said property located in Oklahoma County attached or *each of them* enough thereof as is sufficient to satisfy the judgment and the costs

expended herein, and apply the proceeds accordingly, and that this order be journalized and correcting journal entry entered on pages 323 & 324 & 325 of the records of this Court.

FRANK DALE, *Judge*.

The cross-petitioners, Grigsby Bros. offer in evidence judgment of July 18, 1895, entered in cause No. 1524, in the district Court of Logan County, Oklahoma.

To which the defendants Southern Pine Lumber Company and Chinn and Chinn object as incompetent, irrelevant and immaterial, which objection was by the Court overruled, to which the said defendants excepted.

The same is as follows:

In the District Court in and for Logan County, Oklahoma Territory.

AMERICAN EXCHANGE BANK, a Corporation, Plaintiff,

vs.

T. L. L. TEMPLE and BENJAMIN WHITTAKER, Partners as the Southern Pine Lumber Company, a Corporation Organized under the Laws of the State of Arkansas, and D. J. GRIGSBY and G. M. D. GRIGSBY and T. L. L. TEMPLE, Partners, Doing Business under the Firm Name and Style of the Union Lumber Mills Company, Defendants.

It appearing that the plaintiffs having duly commenced proceedings against the defendants and attachments from this court
205 issued directed to *sieze* the property of defendants, and the four tenths (4 10) undivided interest of D. J. Grigsby and G. M. D. Grigsby and all the interest of T. L. L. Temple and all the interest of D. J. Grigsby and G. M. D. Grigsby and T. L. L. Temple, partners as the Union Lumber Mills Company in and to lots eleven (11) and twelve (12) in block forty-three (43) in that subdivision of Guthrie known as East Guthrie, Logan County, Oklahoma Territory, being attached by the Sheriff of Logan County under writ of attachment against defendants in said proceeding, which was duly appraised and return duly filed into this court, and the defendants having been duly and in time legally warned, who were non-residents, to appear and show cause why attachments on said lots should not be sustained to satisfy the judgment rendered at this term of the court in favor of the plaintiffs and against said defendants, and the said defendants failing to appear, but wholly makes default.

It is, therefore, by the Court considered, ordered, and adjudged that said attachment be sustained with judgment for cost herein expended, and the sheriff of Logan County is directed to sell said interest according to law in said real estate for the payment of said debt, and to make his report to this court.

FRANK DALE, *Judge*.

D. J. GRIGSBY, one of the cross-petitioners, being called and sworn in their behalf, testified as follows:

Direct examination by Mr. PRENDERGAST:

Q. Where was your home in 1894 and 1895?

A. I was living in Marshall, that is, I was sending my daughter to school, and I was there most of the time.

Q. Where was your business?

A. My business was in east Texas in 1894 and 1895; the
206 spring of 1895, in March, I had headquarters at Texarkana; I think that was the time we built the Kansas City Southern south.

Q. Your business was railroad builders?

A. Yes sir.

Q. Where was G. M. D. Grigsby at that time?

A. He was always at his home at Jefferson.

Q. That is sixty miles from Texarkana?

A. Yes sir.

Q. Where was his business and where did his business call him in the year- 1895 and 1894?

A. In the spring of 1895 it called him principally to Texarkana.

Q. In 1894 can you state where he was?

A. In 1894, I don't remember, we were doing work for the Texas & Pacific Road.

Q. Are you both acquainted with T. L. L. Temple?

A. Yes sir.

Q. You had business relations with him up to that time?

A. Our business relations rather ceased with Temple in 1892, I think.

Q. He knew where your headquarters were, and you know where his was?

A. I knew where his was, we had been familiar with each other for years, and he knew my permanent home was in Marshall.

Q. He could have found you at any time in a day or so, could he?

Objected to as argumentative, which objection was by the Court sustained.

A. Yes sir, any time within a week by ad-ressing a letter to us.

Cross-examination by Mr. COOK:

Q. Do you know where a letter would have reached you at that time?

A. Yes sir, a letter always since 1886 would have reached me addressed to Marshall or addressed to Jefferson, or generally
207 addressed to Dallas.

Q. Or Texarkana?

A. No, not at Texarkana, only when I was there; I think that we commenced there in March or in February, 1895, building that Kansas City Southern, and then we had headquarters there, and I had headquarters a number of times at Texarkana.

By Mr. PRENDERGAST: Tom's (Temple) home was at Texarkana at that time?

A. Yes sir.

By Mr. COOK: You were a part of the time in Louisiana, were you not?

A. Oh, yes, I had work down there, I don't know,—yes, I think in 1895 perhaps I had some work at New Orleans. There was very little work going on those times.

The cross-petitioners offer the deposition of D. J. GRIGSBY, which is as follows:

The said D. J. Grigsby answers and says with reference to the note upon which judgment was obtained in Dallas, I remember in the early part of 1891 that the Union Lumber Mills Co. was indebted in the amt. of $3000.00 Grigsby Bros. and Temple concluded to raise the money and pay off the debt. Temple was to raise $1200.00. He insisted that the Union Lumber Mills Co. should give him a note in order that he could raise the money on it. I gave him the note signing the Union Lumber Mills Co. name to it. A while after that he came to get me to renew the paper. He had paid a portion of it in the meantime. I then renewed the paper for him and signed the Union Lumber Mills Co. to it. I am satisfied this is the note sued on, and judgment obtained in Dallas Co. Texas. The Union Lumber Mills Co. was a partnership and not a corporation.

The reason why Temple endorsed the note in person and the Grigsbys did not indorse it was this:—that the original
208 $1200.00 was Temple's portion of the indebtedness of the Union Lumber Mills Co. and Grigsby Bros. raised their $4800.00 and Temple agreed to use his $1200.00 note in raising his portion and to protect it when it become due.

I don't remember definitely when I rec'd information about the Guthrie suit. W. B. Ward and my brother G. M. D. Grigsby are looking after that matter, and whatever I learned was from them.

I know nothing of the transaction with Mr. Auten Receiver it was attended to by my brother.

D. J. GRIGSBY.

Cross-Petitioners, Grigsby Bros. Rest.

The defendants, Southern Pine Lumber Company, and Chinn and Chinn, offer in evidence the answer to Interrogatory Nine, of the Deposition of T. L. L. Temple.

"Answer to Interrogatory Nine. Sometime in 1891 D. J. Grigsby who was controlling the Union Lumber Mills Co. came to me and stated that the Union Lumber Mills Co. needed money. I think it was something like $6000.00 and wanted me to advance some, because I had been interested in a small degree in said Company. I advised that I would not put another dollar into the Union Lumber Mills Co. but he insisted on my giving them assistance in some way, and I finally gave him the Southern Pine Lumber Company's acceptance for $1200.00 and took the Union Lumber Mills Company's paper for that amount. What they did with the money I do not know but D. J. Grigsby received it."

The Defendants, Southern Pine Lumber Company, and Chinn and Chinn, Rest.

Cross-peti-oners here Rest.

Plaintiff Rests.

Case closed.

209 And thereupon the trial of said action being concluded, the said cause was argued by counsel for the parties appearing at the trial and duly submitted to the court; and the court thereupon took the said cause and matter of the findings and judgments therein under advisement.

And afterwards, to-wit, on the 16th day of March, 1903, the court did proceed to decide and determine said cause and the issues therein and did render two judgments therein, which were entered of record in said court upon the journal thereof.

At the time of the rendition thereof and on said 16th day of March, 1903, the defendants, The Southern Pine Lumber Company and T. L. L. Temple and G. W. R. Chinn and Mrs. G. W. R. Chinn, his wife, did duly except to each and all of the orders, rulings and judgments, separately, and gave notice that they would file a motion for a new trial in and of the said cause and action and to vacate the said orders, rulings and judgments.

And afterwards, to-wit, on the 17th day of March, 1903, the same being a judicial day of the regular February term of said Court in said year, at which term said judgments were rendered, the said defendants filed their motion in said cause, which, with the endorsements thereon, is in words and figures as follows, to-wit:

210 TERRITORY OF OKLAHOMA, *County of Logan, ss:*

In the District Court.

W. B. WARD, Plaintiff,

vs.

SOUTHERN PINE LUMBER CO. ET AL., Defendants.

Comes now the defendants, and each of them, within the time allowed by law, and makes and files a motion for a new trial of said cause upon the following grounds, to-wit:

1. For that there was irregularity in the proceedings of the Court and prevailing party, by which Defendants were prevented from having a fair trial.

2. For that there was accident and surprise which ordinary prudence could not have guarded against.

3. For that excessive damages have been given under the influence of pressure or prejudice.

4. For that there was an error in the assessment of the amount of recovery, same being too large.

5. For that the findings of the court are not sustained by the evidence.

6. For that the findings of the court are contrary to law.

7. For that there is newly discovered evidence, material for the party defendants, which they could not, with reasonable diligence, have discovered and produced at the trial.

8. For that there was error of law occurring at the trial excepted to by these Defendants.

9. For other good and sufficient reasons apparent from the record and duly excepted to at the time.

Affidavits and oral testimony will be used on the hearing of this motion. Defendants pray that the judgment before rendered in this case may be vacated, set aside and held for naught.

J. D. COOK,
JOHN COTTERAL,
HARPER S. CUNNINGHAM,
Att'ys for Defendants.

211 3011. Territory of Oklahoma, County of Logan. In District Court. Ward, Plaintiff, *v.* So. Pine Lumber Co., *et al.*, Def'ts. Motion for a new trial. Filed Mar. 17, 1903, Thos. A. Neal, Clerk District Court. J. D. Cook, John Cotteral, Harper S. Cunningham, Att'ys for Defendants.

And afterwards, to-wit, on the 18th day of March, 1903, the same being a judicial day of the February Term, 1903, of said court, at which term said judgments were rendered, the said defendants The Southern Pine Lumber Company, T. L. L. Temple, G. W. R. Chinn and Mrs. G. W. R. Chinn, his wife, did file their motion for a new trial in said action and to set aside and vacate each and all of the findings of the court and each and all of the final orders therein and the final judgments and decrees therein, which motion, with the endorsements thereon, is in words and figures as follows, to-wit:

In the District Court of Logan County, Oklahoma Territory.

Cause Number 3011.

W. B. WARD, Plaintiff,
vs.
F. E. PENTECOST, Trustee, ET AL., Defendants.

Motion for New Trial.

Come now the defendants, The Southern Pine Lumber Co., T. L. L. Temple, G. W. R. Chinn and Mrs. G. W. R. Chinn,
212 his wife, and each and all of said defendants, and respectfully move the Court to set aside and vacate each and all of the findings of the Court, and each and all of the final orders herein, and the final judgment and decree herein, and to grant these defendants,

DARK PAGE BLEED THRU

and each of them, a new trial in and of said cause, upon the grounds and for the causes as follows to-wit:

First. The findings of the court, and each of them, and the final orders herein, and each of them, and the final judgment and decree herein, are, each and all of them, not sustained by sufficient evidence and are, each and all of them, contrary to law.

Second. Error of law occurring at the trial and excepted to by the defendants making this motion.

Third. The Court erred in admitting incompetent, irrelevant, immaterial and illegal evidence at the trial, over the objection of these defendants.

Fourth. The Court erred in excluding legal, competent, material and relevant evidence, over the objection of these defendants.

Fifth. The Court erred in finding in favor of, or establishing, any claim or demand, or any lien or security, in favor of the plaintiff and erred in not finding against the plaintiff, and in finding, ordering and adjudging that the plaintiff has any claim or demand or any lien or security upon the premises involved, and erred in not dismissing the action.

Sixth. The Court erred in not adjudging and decreeing the title to the real premises involved to be in these defendants, and in not finding and holding such title to be in them, as set out in their answer herein.

213 Seventh. The Court erred in finding in favor of the defendants, G. M. D. Grigsby and D. J. Grigsby, and in awarding them the title to the premises involved, or any part thereof, and in not barring and divesting them of all claims, title or interest therein.

Eighth. The Court erred in not finding and holding that the said G. M. D. Grigsby and D. J. Grigsby were, and are, barred from asserting title herein, on account of laches.

Ninth. The Court erred in not finding and holding: that the judgment in the former action, wherein the American Exchange Bank is plaintiff, and The Southern Pine Lumber Co. and others, are defendants, Number 1524, in this Court, is valid and that the same has been assailed herein, upon collateral attack and that the same is invalid and should stand upon said attack.

Tenth. The Court erred in holding the judgment in said former action invalid upon direct or any other attack.

Eleventh. The Court erred in not dismissing the answer and cross-petition of said G. D. M. Grigsby and D. J. Grigsby, for failure to state facts sufficient to constitute a cause of action, or to entitle the said defendants and cross-petitioners to the relief prayed for or to any relief or to the relief adjudged and decreed.

Twelfth. The Court erred in not dismissing said answer and cross-petition and holding against said defendants and cross-petitioners for failure on their part to set up sufficient equities to entitle them to be heard and obtain the relief herein.

J. D. COOK,
H. S. CUNNINGHAM,
COTTERAL & HORNOR,
Attorneys for said Defendants.

Endorsed on back: No. 3011. In the District Court. W. B. Ward, plaintiff, *vs.* F. E. Pentecost, Trustee, *et al.*, Defendants. Motion for new trial. Filed Mar. 18th, 1903. Thos. A. Neal, Clerk District Court.

214 And afterwards, to-wit, on the 4th day of April, 1903, the said motion of said defendants for a new trial in said action, came on regularly to be heard before said court, the plaintiff appearing by his attorney George W. Buckner and the said defendants by their attorneys Cotteral & Hornor, and said motion being duly argued and submitted, the court being duly advised in the premises, did overrule the said motion, to which order and ruling the said defendants making said motion at the time duly excepted and except, and thereupon prayed an appeal to the Supreme Court of the Territory of Oklahoma, which was granted by said court and did ask and were granted sixty days from the said 4th day of April, 1903, in which to make and serve their case-made in said cause for the Supreme Court of the Territory of Oklahoma, and ten days were thereupon allowed to the other parties in said action to suggest amendments to said case-made, and it was further ordered that said case-made be signed and settled on five days' notice in writing.

The said judgments in said action hereinbefore referred to, as entered upon the journal of said court, are in words and figures as follows, to-wit:

215 In the District Court of Logan County, Oklahoma Territory.

No. 3011.

W. B. Ward, Plaintiff,

vs.

F. E. Pentecost, Trustee of an Express Trust, to the Use and Benefit of the National Bank of Jefferson, Jefferson, Texas, *cestui que trust;* The Southern Pine Lumber Co., a Corporation Organized and Existing under the Laws of Arkansas; T. L. L. Temple and Benjamin Whittaker, Partners under the Firm Name and Style of the Southern Pine Lumber Co.; G. M. D. Grigsby and D. J. Grigsby, Partners Composing the Firm of Grigsby Bros., in the County of Marion, in the State of Texas, and J. W. McNeal, Charles Griswold, Hattie P. De Bois, J. D. Elder, William H. Duncan, Anna Bannister, G. W. R. Chinn and Mrs. G. W. R. Chinn, His Wife, and T. L. L. Temple, and All Persons Claiming, under or through the Southern Pine Lumber Co. or T. L. L. Temple, Any of the Property Hereinafter Described in this Petition, and the American Exchange Bank, a Corporation Organized and Existing under the Laws of the State of Missouri, Defendants.

Journal Entry.

Now, to wit, on this 16th day of March, A. D. 1903, the above cause came on for hearing on the cross-petition and amendment

thereto filed in this action by the defendants, G. M. D. Grigsby and D. J. Grigsby as against the plaintiff and other defendants in this action above named, the plaintiff appeared in person and by his attorney Geo. W. Buckner, the defendants the Southern Pine Lumber Co., a corporation, and the Southern Pine Lumber Co., a co-partnership composed of T. L. L. Temple and Benjamin Whittaker, and G. W. R. Chinn and Mrs. G. W. R. Chinn his wife, appeared in person and by their attorneys J. D. Cook, Cotteral & Hornor, Harper S. Cunningham and Fred. M. Elkins; the defendants and cross-petitioners G. M. D. Grigsby and D. J. Grigsby appeared in person and by their attorney F. H. Prendergast; the defendants F. E.
216 Pentecost, Trustee, Hattie P. De Bois, J. D. Elder, William H. Dungan and Anna Bannister, and the American Exchange Bank of St. Louis, Mo., a corporation, organized and existing under the laws of the State of Missouri, each failed to appear but made default; thereupon all of said parties, plaintiff and defendants, announced themselves ready for trial; G. M. D. Grigsby and D. J. Grigsby defendants and cross-petitioners, introduced their evidence and rested their cause; the plaintiff, W. B. Ward, and the Southern Pine Lumber Co., a co-partnership, and the Southern Pine Lumber Co., a corporation, and G. W. R. Chinn and Mrs. G. W. R. Chinn, his wife, each introduced their evidence and rested their case; and the court after hearing the evidence of all the parties and arguments of the counsel, and being sufficiently advised in the premises, finds the issues in favor of G. M. D. Grigsby and D. J. Grigsby on their answer and cross-petition in this case.

The court further finds that the defendants Hattie P. De Bois and F. E. Pentecost, Trustee, were each personally served with summons in the county of Logan and Territory of Oklahoma, but made default. The court further finds that the defendants The American Exchange Bank of St. Louis, Mo., a corporation duly organized and existing under and by virtue of the laws of the state of Mo. and the defendants J. D. Elder, William H. Dungan and Anna Bannister, are each non-residents of the Territory of Oklahoma, and have been duly and legally served by publication service, as provided by the laws of the territory of Oklahoma; and the court further finds that these defendants and cross-petitioners could not with due diligence make service of summons on said defendants or either of them, within the
217 territory of Oklahoma; and the court further finds that the service by publication on each of the said defendants is legal and valid in all respects and hereby approves the same.

The court further finds that each of the parties to this action waived a trial by jury and submitted this cause to the court upon agreement; the court further finds from the evidence and the pleadings that it is admitted by the defendants G. M. D. Grigsby and D. J. Grigsby the cross-petitioners in this action, that they are indebted to the plaintiff, W. B. Ward, by reason of the note and trust deed sued on by the plaintiff in this action, in the sum of Five Thousand Seven Hundred and Ninety-seven Dollars ($5,797.00) and that said debt is a legal and subsisting debt as against the defendants and is a legal charge upon the property involved in this action.

The court further finds from the evidence that the judgment in cause number 1524 entitled the American Exchange Bank, a corporation, organized under the laws of the state of Mo., plaintiff, vs. T. L. L. Temple, and Benjamin Whittaker, partners as The Southern Pine Lumber Co., The Southern Pine Lumber Co., a corporation organized under the laws of the State of Arkansas, and D. J. Grigsby and G. M. D. Grigsby and T. L. L. Temple under the firm name of the Union Mills Lumber Co., rendered on the second day of March, 1895, in the District Court of Logan County, Oklahoma Territory, and on which judgment orders of sale issued out of said court, to the sheriff of Logan County and the sheriff of Oklahoma County and under said orders of sale property in the city of Guthrie, and in the city of Oklahoma, in Oklahoma territory, was sold to satisfy said judgment are each null and void and of no force or effect.

The court further finds that the service in said cause number 1524 as against these defendants and cross-petitioners, was by publication of summons, that the defendants and cross-petitioners had no knowledge of the pendency of said action in time to appear in said court and make a defense thereto.

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The court further finds that the affidavits for publication service and for attachment in said action were each wholly insufficient and did not state facts sufficient to confer jurisdiction upon the court to render said judgment or to order the sale of the property thereunder; and the court further finds that the petition filed in said cause wholly fails to state facts sufficient to confer jurisdiction upon said court to render said judgment, and is wholly insufficient in law to support a judgment; the court further finds that The American Exchange Bank of St. Louis, Mo., the plaintiff in said action never at any time brought said suit, or authorized any one to bring said action in its name, and had no knowledge of the pendency of said action until a long time after the rendition of the judgment therein and the property had been sold thereunder. The court further finds it a fact that the defendants in said action did not owe the plaintiff, The American Exchange Bank, any sum or sums of money, the court further finds as a fact that said action was prosecuted by one of the defendants as against himself and other defendants in the name of the American Exchange Bank, without its knowledge or consent, and for the purpose of defrauding these defendants and cross-petitioners out of their property rights involved in this action, and the court further finds that said action was a fraud and an imposition upon the court as well as on the defendants and cross-petitioners, the court further finds that the Southern Pine Lumber Co., a corporation, and T. L. L. Temple and all other persons purchasing at the sheriff's sale under the judgment in said cause number 1524 above referred to and their grantees, took nothing by their purchase, by reason of said judgment and proceedings had thereunder, being without jurisdiction in the court and absolutely void.

219

The court further finds that the affidavits upon which the writs of attachment were issued in said cause was wholly insufficient in law to confer jurisdiction on the court to issue said writs of attachment, and the court finds that the levy of said attachment upon

property involved in this action, and the sale thereof under the order of the court, and the confirmation of the sale of said property, and every step taken therein are illegal and void and of no force and effect;

The court further finds that G. M. D. Grigsby and D. J. Grigsby defendants and cross-petitioners in this action are the owners of the fee simple title to the following described property to-wit: the same being the property sold under the said judgment in said cause number 1524, and involved in said action.

An undivided (4/5) four-fifths interest in and to lots number (17) Seventeen, (18) eighteen, (19) nineteen, (20) twenty and (21) twenty-one, in block number (60) sixty, in Oklahoma City in the County of Oklahoma, and in the Territory of Oklahoma, also an undivided (4/5) four-fifths interest in and to an undivided (5/10) five-tenths or (1/2) one-half interest in and to lots number (4) four, (5) five, (6) six, (7) seven, and (21) twenty-one in block number (43) forty-three in the City of Guthrie, Logan County, Oklahoma Territory, commonly known as Guthrie Proper, also an undivided (4/5) four-fifths interest in and to lot number (9) nine in block number (54) fifty-four, in that subdivision of the City of Guthrie, Logan County, Oklahoma Territory, commonly known as Guthrie Proper; also an undivided (4/5) four-fifths interest in and to an undivided (1/2) one-half interest in lots number (11) eleven, and (12) twelve in block number (43) forty-three, in that subdivision of the city of Guthrie, Logan County Oklahoma
220 Territory, known as East Guthrie, also an undivided (4/5) four-fifths interest in and to an undivided (1/2) one-half interest in lot number (15) fifteen in block number (-1) fifty-one, on Harrison Ave., in that subdivision of the City of Guthrie, Logan County, Oklahoma Territory, commonly known as East Guthrie, according to the recorded plat thereof, on file with the respective registers of deeds of the counties of Logan and Oklahoma, and in the Territory of Oklahoma.

The court further finds that the defendants and cross-petitioners are entitled to immediate possession of said property, subject to the foreclosure proceedings of the plaintiff, W. B. Ward, in this action.

The court further finds from the evidence that as against the other defendants in this action, these defendants and cross-petitioners are the owners, of the legal and equitable estate in and to the property above described, and are entitled to have their title quieted to said property as against the other defendants in this action.

It is therefore ordered, considered and adjudged by the court that the title to said property, and each and every parcel thereof, be and the same is hereby quieted in the defendants and cross-petitioners G. M. D. Grigsby and D. J. Grigsby, subject to foreclosure proceedings of the plaintiff W. B. Ward; the defendants and each and every one of them are hereby declared to have no right title or interest on or to said property by reason of their purchase at said sheriff's sale, and they are hereby forever barred from setting up and asserting any right, title, claim or interest in and to said

property herein described, adverse to or against these defendants and cross-petitioners or their grantees.

The court further finds that the defendants and cross-petitioners are entitled to recover of and from the other defendants in this action, their costs in the above cause laid out and expended
221 on their cross-petition.

It is further ordered, considered and adjudged that the judgment in the cause of the American Exchange Bank *vs.* The Southern Pine Lumber Co., and others being cause number 1524, above referred to and all other proceedings had in said cause prior to and after said judgment are hereby declared null and void and set aside and vacated.

Thereafter on to-wit the 17th day of March, A. D. 1903, the defendants the Southern Pine Lumber Co., a corporation, and the Southern Pine Lumber Co., a co-partnership, composed of T. L. L. Temple and Benjamin Whittaker; and T. L. L. Temple individually, and G. W. R. Chinn and Mrs. G. W. R. Chinn, his wife, filed in this court their two separate motions for a new trial and the court after hearing the arguments of the counsel thereon and being fully advised in the premises, and thereafter on to-wit, the 4th day of April, A. D. 1903, overruled each of said motions, to which the said defendants at the time excepted and prayed an appeal to the Supreme court of the Territory of Oklahoma.

It is therefore ordered, considered and adjudged by the court that said defendants be granted an appeal herein, and they are hereby given sixty days in which to make and serve their case-made for the Supreme court, and ten days are allowed thereafter in which to suggest amendments thereto, and five days are allowed in which to sign and settle said case-made.

(Signed) JNO. H. BURFORD, *Judge.*

O. K."

____ ____,

Atty for Answering Defendants.

Endorsed on Back: No. 3011. W. B. Ward *vs.* So. Pine Lumber Co. *et al.* Journal Entry. Filed Apr. 13, 1903, Thos. A. Neal, Clerk District Court.

222 In the District Court of Logan County, Oklahoma Territory.

No. 3011.

W. B. WARD, Plaintiff,

vs.

F. E. PENTECOST, Trustee of an Express Trust to the Use and Benefit of the National Bank of Jefferson, at Jefferson, Tex., *cestui que trust;* THE SOUTHERN PINE LUMBER CO., a Corporation Organized and existing under the Laws of Arkansas; T. L. L. TEMPLE and BENJAMIN WHITTAKER, Partners under the Firm Name and Style of the Southern Pine Lumber Co.; G. M. D. GRIGSBY and D. J. GRIGSBY, Partners Composing the Firm of Grigsby Bros., in the County of Marion in the State of Tex.; J. W. MCNEAL, CHARLES GRISWOLD, HATTIE P. DE BOIS, J. D. ELDER, WILLIAM H. DUNGAN, ANNA BANNISTER, G. W. R. CHIN and MRS. G. W. R. CHINN, His Wife, and T. L. L. TEMPLE, and All Persons Claiming, under or through the Southern Pine Lumber Co. or T. L. L. Temple, Any of the Property Hereinafter Described in this Petition of the Plaintiff, Defendants.

Journal Entry.

Now, to-wit, on the 16th day of March, A. D., 1903, the above cause came on for hearing; the plaintiff appeared in person and by his attorney, Geo. W. Buckner; the defendants, The Southern Pine Lumber Company, a corporation, and the Southern Pine Lumber Co., a co-partnership, and T. L. L. Temple, G. W. R. Chinn, and Mrs. G. W. R. Chinn, his wife, appeared in person and by their attorneys, J. D. Cook, Cotteral & Hornor, Harper S. Cunningham and Fred S. Elkins; defendants G. M. D. Grigsby and J. D. Grigsby appeared in person and by their attorney F. H. Prendergast; the defendants J. D. Elder, Hattie P. De Bois, William H. Dungan and Anna Bannister, each failed to appear, either in person or by their attorney, but made default; thereupon the parties announced themselves ready for trial; plaintiff introduced his evidence and rested; the defendants introduced their evidence and rested; all of the parties waive a jury trial herein, and submitted the cause

223 to the court; and the court after hearing the evidence, finds that all of the allegations contained in the plaintiff's petition, filed herein are true, and that there is due from defendants G. M. D. Grigsby and J. D. Grigsby to the plaintiff W. B. Ward on the note and mortgage sued on in this action, the sum of ($5,100) Five Thousand One Hundred Dollars, and that said note specifies that said indebtedness shall bear interest, at the rate of 12% per annum, from maturity, and that said mortgage specifies the same rate of interest, and the court further finds that said plaintiff has a lien on the lands and tenements in said petition described, by virtue of the mortgage or trust deed in said petition set out, to secure payment of said indebtedness.

The court further finds that the defendant Hattie P. De Bois, was personally served with summons in the county of Logan, and Territory of Oklahoma, in this action, but she is in default; the court further finds that the defendants J. D. Elder, William H. Dungan and Anna Bannister, were duly and legally served by publication notice in this action, as provided by the laws of the territory of Oklahoma; and the court further finds that each of the last named defendants were non-residents of the territory of Oklahoma, and that plaintiff with due diligence could not make service of summons on said defendants within the territory of Oklahoma.

The court further finds that the service of publication on said defendants is legal and regular in all respects and hereby approves the same; the court further finds that the other defendants have all entered their appearance to this action and were personally served with summons herein.

The court further finds that F. E. Pentecost, trustee, for the National Bank of Jefferson, of Jefferson, Tex. was personally served with summons in this action, and also made default; the court further finds at this time that the said F. E. Pentecost, trustees, on
224 the — day of ——, 190-, departed this life, leaving no administrator nor legal representatives, and the court further finds from the evidence that the judgment in cause number 1524, entitled the American Exchange Bank of St. Louis, Mo. against the Southern Pine Lumber Co. *et al* defendant, rendered in the District Court of Logan County, Oklahoma Territory, on the 2nd day of March, 1895, and all proceedings or transfers of property under and by virtue of said judgment and cause of action, are each null and void and of no force and effect, and that the purchasers at the sale of the property levied upon, under such judgment, took nothing by their purchase; the court finds that the trust deed sued upon in this action and the note which said deed was given to secure, are each legal and valid as against the defendants G. M. D. Grigsby and D. J. Grigsby, that the plaintiff is entitled to have said deed foreclosed as a mortgage in this action.

The court further finds that it is provided by said note and trust deed sued upon by the plaintiff in this action, that 10% of *of* the amount due and recovered by the plaintiff if sued upon by attorneys for collection, shall be taxed as a part of the judgment and as attorneys fees in the action, which amounts to the sum of Five Hundred and twenty-seven dollars ($527.00).

The court further finds that W. B. Ward the plaintiff in this action is at this time the owner of said note and trust deed; It is therefore considered, ordered and adjudged by the court that the said plaintiff W. B. Ward, do have and recover of and from the said defendants G. M. D. Grigsby and D. J. Grigsby, the said sum of Five Thousand One Hundred Dollars being the amount of the principal due on said note, and the further sum of One Hundred and seventy Dollars, being the amount of interest due on said note to this date, and
225 the further sum of Five Hundred Twenty-seven dollars, as attorneys fees, being 10% of the amount recovered in this action, and the further sum of —— Dollars, cost in the above cause

expended by the said plaintiff, said several sums being the amounts due the plaintiff, as found by the court making in the aggregate, exclusive of costs, the sum of Five Thousand Seven Hundred and ninety-seven dollars.

It is further ordered and adjudged that said judgment for Five Thousand and Seven Hundred and ninety-seven dollars, bear interest at the rate of twelve % per annum from the date of this decree; and it is further ordered and adjudged by the court that in case the said defendants G. M. D. Grigsby and D. J. Grigsby fail to pay the plaintiff the sum of $5797.00 Dollars and costs, the amount due as aforesaid, to said plaintiff, together with the interest thereon, and the costs of this action, that an order of sale issue to the sheriff of said county of Logan, and to the sheriff of Oklahoma County, in the territory of Oklahoma, commanding them to advertise and sell according to law with appraisement as provided by the statutes of the Territory of Oklahoma, the lands and tenements in said petition, described as follows, to-wit:

An undivided (4/5) four-fifths interest in and to lots number (17) seventeen and (18) eighteen, (19) nineteen, (20) twenty and (21) twenty-one, in block number (60) sixty, in Oklahoma City, in the county of Oklahoma, in the territory of Oklahoma, also an undivided (4/5) four-fifths interest in and to an undivided (5/10) five-tenths or (½) one-half interest in and to lots number (4) four, (5) five, (6) six, (7) seven and (21) twenty-one in block number (43) forty-three in the city of Guthrie, Logan County, Oklahoma Territory, commonly known as Guthrie Proper, also an undivided (4/5) four-fifths interest in and to lot number (9), Nine, in block number (54) fifty-four, in that subdivision of the city of Guthrie,
226 Logan County, Oklahoma Territory, commonly known as Guthrie Proper: also an undivided (4/5) four-fifths interest in and to an undivided (½) one-half interest in lots number (11) eleven and (12) twelve, in block number (43) forty-three, in that subdivision of the city of Guthrie, Logan County, Oklahoma Territory, known as East Guthrie, also an undivided (4/5) four-fifths interest in and to an undivided (½) one-half interest in lot number (15) fifteen in block number (51) fifty-one, on Harrison Ave., in that subdivision of the city of Guthrie, Logan County, Oklahoma Territory, commonly known as East Guthrie, according to the recorded plat thereof, on file with the respective Registers of Deeds of the counties of Oklahoma and Logan, in the territory of Oklahoma, together with all and singular, the rights, numbers hereditaments and appurtenances to the same in any manner belonging or appertaining, and to apply the proceeds arising from said sale 1st in the payment of the costs of said sale, and of this action, second in the payment to the said plaintiff of said sum of Five Thousand seven Hundred Ninety-seven dollars, the amount so as aforesaid found due to said plaintiff, which sum includes the interest thereon, and attorneys fees herein found due; that the residue, if any there be, to be paid to the said defendants G. M. D. Grigsby and D. J. Grigsby; and it is further ordered and adjudged by this court that from and after the sale of said lands and tenements under and by virtue of this

judgment and decree, that the said defendants G. M. D. Grigsby and D. J. Grigsby, and all persons claiming under them since the commencement of this action, and *that* each and all of the defendants; and that each and all the other defendants in this action be, and they are hereby forever barred and fore-closed of and from all lien upon, right, title or interest or estate or equity of redemption of in or to said lands and tenements or any part thereof.

227 Thereafter on to-wit the 17th day of March, A. D. 1903, the defendants the Southern Pine Lumber Co., a corporation, and the Southern Pine Lumber Co., a co-partnership, composed of T. L. L. Temple and Benjamin Whittaker, and T. L. L. Temple, individually, and G. W. R. Chinn and Mrs. G. W. R. Chinn, his wife, filed in this court their two separate motions for a new trial, and the court after hearing the arguments of the counsel thereon, and being fully advised in the premises, and thereafter on to-wit, on the 4th day of April, A. D. 1903, overruled each of said motions to which the said defendants at the time excepted and prayed an appeal to the Supreme Court of the Territory of Oklahoma.

It is therefore ordered, considered, and adjudged by the court that said defendants be granted an appeal herein and they are hereby given 60 days in which to make and serve their case-made for the Supreme Court, and ten days is allowed thereafter, in which to suggest amendments thereto; and five days are allowed in which to sign and settle said case-made.

(Signed) JNO. H. BURFORD, *Judge*.

"O. K."

____ ____,

Atty for Answering Defendants.

Endorsed on back: No. 3011. W. B. Ward *vs.* So. Pine Lumber Co. *et al.* Journal Entry. Filed Apr. 13, 1903. Thos. A. Neal, Clerk District Court.

The said Bank has never been served in any process, either personally or constructive in this action, and has never made any appearance herein.

228 The defendants William H. Dungan and Anna Bannister and J. D. Elder, have not been shown in said action to have any right, title, interest, or claim, in or to the premises or property involved in this action.

Also the said William H. Dungan, Anna Bannister and J. D. Elder are each of them non-residents of the Territory of Oklahoma, their residence and whereabouts are wholly unknown and cannot be found or ascertained by any means or diligence, and never had any personal or actual knowledge of the pendency of this action or any order or proceeding in this action.

None of said three named defendants have ever been present or had a place of residence or abode in the Territory of Oklahoma since the filing of the original petition in this action.

And thereafter, to-wit, on the first day of June, 1903, the said defendants, The Southern Pine Lumber Company, T. L. L. Temple, G. W. R. Chinn, and Mrs. G. W. R. Chinn, his wife, did make due application to the Honorable John H. Burford, the Judge of said Court and the trial judge in said action, at his Chambers, at Guthrie, Oklahoma Territory, for an extension of time in said action in which to make and serve their case-made for the Supreme Court of the Territory of Oklahoma, and due cause appearing, it was by the said Honorable Judge, on said June 2nd, 1903, duly ordered that the said defendants making said application, be and they were then granted an extension of time for the term of sixty-days from the said 2nd day of June, 1903, in which to make and serve their case-made in said action for the said Supreme Court of the Territory of Oklahoma, which order of the said Honorable Judge now of record in said court, is in words and figures as follows, to-wit:

229 In the District Court of Logan County, Oklahoma Territory.

Cause Number 3011.

W. B. WARD, Plaintiff,
vs.
F. E. PENTECOST, Trustee, ET AL., Defendants.

Order.

Now, on this, the 1st day of June, 1903, come the defendants, The Southern Pine Lumber Company, T. L. L. Temple, G. W. R. Chinn and Mrs. G. W. R. Chinn, his wife, and make application before me, at Chambers, in the City of Guthrie, in the Territory of Oklahoma, for an order extending time in which to make and serve a case-made in this action, and from the showing submitted it is found by me that on account of other court work, the stenographer of this court has been unable to prepare a transcript of the evidence in this cause and that such application should be granted.

It is therefore by me ordered this 1st day of June, 1903, that the said defendants be and they are hereby granted an extension of time for the term of sixty (60) days from this date in which to make and serve their case-made in this action, and that the other parties to the action be granted ten (10) days after such service in which to suggest amendments to said case-made and that the said case-made be signed and settled on five days notice in writing.

(Signed) JNO. H. BURFORD,
Judge District Court, Logan County, Oklahoma Territory.

Endorsed on back: No. 3011. W. B. Ward *et al. vs.* Southern Pine Lumber Co. Order extending time to make and serve case-made. Filed June 1, 1903. Thos. A. Neal, Clerk District Court. Filed Mar. 16, 1904. Benj. F. Hegler, Clerk Supreme Court, by Jessie Pardoe, Deputy.

230 And afterwards, to-wit, on the 29th day of July, 1903, the said defendants the Southern Pine Lumber—, T. L. L. Temple, G. W. R. Chinn and Mrs. G. W. R. Chinn, his wife, did make a further application for an extension of time in which to make and serve their case-made in said action and due cause appearing, a certain and further order was made by said Honorable Judge of date July 29th, 1903, extending said time to make and serve said case-made, for the term of sixty days from said 29th day of July, 1903, which order now of record in said court, is in words and figures as follows, to-wit:

In the District Court of Logan County, Oklahoma Territory.

Cause Number 3011.

W. B. WARD, Plaintiff,
vs.
F. E. PENTECOST ET AL., Defendants.

Order.

Now come the defendants The Southern Pine Lumber Co., T. L. L. Temple, G. W. R. Chinn and Mrs. G. W. R. Chinn, his wife, and each of them and make application for an order extending the time to said defendants in which to make and serve their case-made in said action for the Supreme Court of the Territory of Oklahoma, and due cause appearing, it is by me ordered this date that the said defendants be and they are hereby granted an extension of time for the term of sixty days from this date in which to make and serve the said case-made and the other parties hereto are granted ten days in which to suggest amendments thereto, said case-made to be signed and settled on five days' notice in writing.

231 Done at Chambers, at Guthrie, Oklahoma, July 29th, 1903.

(Signed) JNO. H. BURFORD,
Judge District Court.

Filed Mar. 16, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court.
By JESSIE PARDOE, *Deputy.*

And, afterwards, to-wit, on the 24th day of September, 1903, the Honorable Jno. H. Burford, Judge of the District Court of Logan County, Oklahoma Territory, and the trial judge in said cause, did make a further order in the First Judicial District of the Territory of Oklahoma, extending the time to the defendants making this case-made, in which to make and serve the same, and did make certain other orders herein, all of which orders are now of record in the District Court of Logan County, Oklahoma Territory, and are as follows, to-wit:

In the District Court of Logan County, Oklahoma Territory.

Cause Number 3011.

W. B. WARD, Plaintiff,
vs.
F. E. PENTECOST, Trustee, ET AL., Defendants.

Order.

Now on this the 24 day of September, 1903, the defendants, the Southern Pine Lumber Company, T. L. L. Temple, G. W. R. Chinn and Mrs. G. W. R. Chinn, his wife, make application to me for an order extending the time of said defendants in which to make and serve their case-made in said action, and due cause appearing, it is by me ordered that the said defendants be and they are
232 hereby allowed an extension of time for the term of thirty days from this date in which to make and serve their case-made in said action for the Supreme Court of the Territory of Oklahoma, the other parties to said action to have ten days to suggest amendments thereto, and the said case-made to be signed and settled on five days' notice in writing.

Done at Chambers, in Chandler, Oklahoma, in the First Judicial District, this 24 day of September, 1903.

(Signed) JNO. H. BURFORD,
Judge District Court.

Filed Mar. 16, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

The foregoing is a true, full and complete statement of all the pleadings, motions, files, papers, orders, judgment and proceedings of every kind and character, including the final judgment in the above entitled cause.

J. D. COOK,
H. S. CUNNINGHAM,
COTTERAL & HORNOR,
Attorneys for the defendants, the Southern Pine Lumber Company, T. L. L. Temple, G. W. R. Chinn and Mrs. G. W. R. Chinn, his Wife.

233 In the District Court of Logan County, Oklahoma Territory.

W. B. WARD, Plaintiff,
vs.
F. E. PENTECOST, Trustee, ET AL., Defendants.

Acknowledgement and Waiver.

Come now the following named defendants in the said action and hereby expressly waive the service upon them of any case-made in the said action, by the defendants and each of them, and waive any and all notice of the signing, settlement, attesting and filing of any case-made in said action, and waive any and all issuance and service of summons in error in the Supreme Court of the Territory of Oklahoma in said action, on appeal.

Witness our hands hereunto subscribed this the 12th day of September, 1903.

E. L. BLINCOE.
J. W. McNEAL.
C. H. GRISWOLD.
H. P. DE BOIS.

Filed Mar. 16, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court.
By JESSIE PARDOE, *Deputy.*

234 The due service of the foregoing case-made, by the delivery of the same, is hereby acknowledged to have been made on the said W. B. Ward, plaintiff, this the twelfth (12th) day of October, 1903.

BUCKNER & SON,
Per G. W. B.
Attorneys for W. B. Ward, Plaintiff.

Filed Mar. 16, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court.
By JESSIE PARDOE, *Deputy.*

Due service of the foregoing case-made, by the delivery of the same, is acknowledged to have been made on the undersigned defendants and cross-petitioners, this the 15th day of October, 1903.

F. H. PRENDERGAST,
Attorneys for G. M. D. Grigsby and D. J. Grigsby, Partners Composing the Firm of Grigsby Brothers, and Each of Them.

Filed Mar. 16, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court.
By JESSIE PARDOE, *Deputy.*

235 In the District Court of Logan County, Oklahoma Territory.

Cause Number 3011.

W. B. WARD, Plaintiff,
vs.
F. E. PENTECOST, Trustee, ET AL., Defendants.

Waiver.

The American Exchange Bank, of St. Louis, Missouri, hereby waives the service upon it of the case-made of the Southern Pine Lumber Company, and other defendants, and each of them, in the above entitled action, provided nothing herein nor the execution or filing hereof constitutes an entry of appearance in said cause, Dated this 14th day of October, 1903, at St. Louis, Mo.

AMERICAN EXCHANGE BANK,
By WALKER HILL, *Pt.*

Attest.
[SEAL.] L. D. BATTAILE, *Sec'y.*

The due service of the foregoing case-made by the delivery of the same, is hereby acknowledged to have been made on the undersigned American Exchange Bank, on the 18th day of February, 1904.

AMERICAN EXCHANGE BANK,
By WALKER HILL, *President.*

Filed Mar. 16, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court.
By JESSIE PARDOE, *Deputy.*

236 In the District Court of Logan County, Oklahoma Territory.

Cause Number 3011.

W. B. WARD, Plaintiff,
vs.
F. E. PENTECOST, Trustee, ET AL., Defendants.

Waiver.

Comes now Benjamin Whittaker, defendant in the above entitled action, and hereby waives the service upon him of the case-made of the defendants, or any of them, in said action, and also waives service of notice of the time and fact and place of settlement, signing and filing of any such case-made.

Dated this October 16th, 1903.

BENJAMIN WHITTAKER.

Filed Mar- 16, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court.
By JESSIE PARDOE, *Deputy.*

And afterward, to-wit: on the twenty-first day of October, 1903, the Honorable Judge of the District Court of Logan County, Oklahoma Territory, and the Trial Judge in said action, did make a further order in said action at Chambers, in Stillwater, Oklahoma Territory, extending the time in which the case-made in said action was to be made and served, to-wit; the term of sixty (60) days from the twenty-fourth day of October, 1903, which order is in words and figures, as follows, to-wit:

237 In the District Court of Logan County, Oklahoma Territory.

Cause Number 3011.

W. B. WARD, Plaintiff,
vs.
F. E. PENTECOST, Trustee, ET AL., Defendants.

Comes now the defendants, The Southern Pine Lumber Company T. L. L. Temple, G. W. R. Chinn and Mrs. G. W. R. Chinn and make application for an extension of time in which to make and service their case-made for the Supreme Court of the Territory of Oklahoma. The said application being duly considered, it is found that the same should be granted.

It is therefore by me ordered that the said defendants be and they are hereby granted a further extension of time for the term of sixty days from the 24th day of October, 1903, in which to make and serve their case-made in said action for the Supreme Court of the Territory of Oklahoma.

The other parties to said action have ten days to suggest amendment thereto and the said case-made is to be signed and settled on five days' notice in writing.

Done at Chambers, at Stillwater, this 21st day of October, 1903.

JNO. H. BURFORD,
Judge District Court.

Filed Mar. 16, 1904.

BENJ F. HEGLER,
Clerk Supreme Court.
By JESSIE PARDOE, *Deputy.*

238 Afterward, to-wit; on the twenty-second day of December, 1903, the said Honorable Judge of the District Court of Logan County, Oklahoma Territory, and the Trial Judge in said action, did make a further order at Chambers, in Guthrie, O. T. further extending the time in which the case-made in said action might be served, to-wit; for the term of sixty (60) days from the twenty-second day of December, 1903, which order is in words and figures, as follows; to-wit:

In the District Court of Logan County, Oklahoma Territory.

Cause Number 3011.

W. B. WARD, Plaintiff,
vs.
F. E. PENTECOST ET AL., Defendants.

Order.

Now come the defendants The Southern Pine Lumber Co., T. L. L. Temple, G. W. R. Chinn and Mrs. G. W. R. Chinn, his wife, and each of them and made application for an order extending the time to said defendants in which to make and serve their case-made in said action for the Supreme Court of the Territory of Oklahoma, and due cause appearing, it is by me ordered this date that the said defendants be and they are hereby granted an extension of time for the term of sixty days from this date in which to make and serve their case made and the other parties hereto are granted ten days in which to suggest amendments thereto, said case-made to be signed and settled on five days notice in writing.

Done at Chambers, at Guthrie, Oklahoma, December 22nd, 1903.

JNO. H. BURFORD,
Judge District Court.

Filed Mar. 16, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court.
By JESSIE PARDOE, *Deputy.*

239 In the District Court of Logan County, Oklahoma Territory.

Cause Number 3011.

W. B. WARD, Plaintiff,
vs.
F. E. PENTECOST, Trustee, ET AL., Defendants.

Affidavit of Service.

STATE OF MISSOURI, *County of St. Louis:*

T. H. Garrett, of lawful age, being duly sworn upon oath, deposes and says:

That on the 18th day of February, 1904, he served the foregoing case-made on the defendant, The American Exchange Bank, of St. Louis, Missouri, by delivering the said foregoing case-made to Walker Hill President of the said bank in the City of St. Louis, in the State of Missouri. I further state that said case-made was left with said Walker Hall, upon whom said service was made.

T. H. GARRETT.

Subscribed and sworn to before me this 18th day of February, 1904.

[SEAL.] WM. A. MARSHALL,
Notary Public.

My commission expires Oct. 17, 1905.

Filed Mar. 16, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*,

240 In the District Court of Logan County, Oklahoma Territory.

Cause Number 3011.

W. B. WARD, Plaintiff,
vs.
F. E. PENTECOST ET AL., Defendants.

Notice.

The plaintiff in the said action, and each of the defendants in said action are hereby notified that the defendants, The Southern Pine Lumber Company, T. L. L. Temple, G. W. R. Chinn, and Mrs. G. W. R. Chinn, will present their case-made in said action for signing, settlement, attesting and filing as provided by law, to the Honorable John H. Burford, Judge of the said District Court, at the District Court Room in the City of Guthrie, in Logan County, Oklahoma Territory, at 9 o'clock A. M. on the 14th day of March, 1904, and said parties so notified will govern themselves accordingly.

J. D. COOK,
COTTERAL & HORNOR.
Attorneys for Southern Pine Lumber Company, T. L. L. Temple, G. W. R. Chinn, and Mrs. G. W. R. Chinn, His Wife.

Filed Mar. 16, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Service of the foregoing notice by true copy thereof is acknowledged to have been made on the undersigned parties in said action on the dates set opposite their names. But we do not waive any objection that the matter is presented too late.

—— ——, ——, 1904.
—— ——, ——, 1904.
F. H. Prendergast, March 5th, 1904.
—— ——, ——, 1904.
—— ——, ——, 1904.
—— ——, ——, 1904.

241 Filed Mar. 16, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

The due service of the foregoing notice by true copy is acknowledged to have been made on said plaintiff, W. B. Ward, on March 2nd, 1904.

W. B. WARD, *Plaintiff*,
By GEO. W. BUCKNER,
His Attorney.

242 In the District Court of Logan County, Oklahoma Territory.

Cause Number 3011.

W. B. WARD, Plaintiff,
vs.
F. E. PENTECOST ET AL., Defendants.

Waiver and Stipulations.

Comes now the defendant, American Exchange Bank, and hereby waives notice of the time and fact and place of the signing, certifying, settlement, attesting, and filing of the case-made in said action, and waives all objection to the same being done without further notice.

Dated this March fifth, 1904.

AMERICAN EXCHANGE BANK, *Defendant*,
By WALKER HILL, *President*.

Filed Mar. 16, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy*.

243 TERRITORY OF OKLAHOMA, *Logan County*, *ss*:

This is to certify, that the foregoing above case-made and the amendments thereto have been duly served in due time, and the amendments thereto duly suggested, and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same, as above set forth, and as corrected by me, is true and correct, and contains a true and correct statement of all the pleadings, motions, orders evidence, findings, proceedings and judgments in such cause; and I hereby settle, allow, certify and sign the same as true and correct, and I hereby order that the Clerk of the District Court of Logan County, Oklahoma Territory attest the same with the name and seal of said Court, and file the same of record as provided by law.

I further certify that the said case-made and the amendments thereto were duly presented to me at 9 o'clock, A. M., March 14, 1904, and the signing, settlement, and attesting thereof by me duly continued and adjourned until the date hereof.

Witness my hand at Guthrie, Oklahoma Territory, this the 15 day of March, A. D., 1904.

JNO. H. BURFORD,
Judge of the District Court of Logan County, Oklahoma Territory.

Attest:

[SEAL.] T. A. NEAL,
Clerk of the District Court of Logan County, Oklahoma Territory,
By FLORENCE N. WEIRICK, *Deputy.*

Filed Mar. 16, 1904.

THOS. A. NEAL,
Clerk District Court.

Filed Mar. 16, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

244 TERRITORY OF OKLAHOMA, *Logan County, ss:*

I, T. A. Neal, Clerk of the District Court of Logan County, Oklahoma Territory, do hereby certify that the copies of papers, files, motions, pleadings, orders and judgments, contained in the foregoing case-made are true full and complete copies of the originals thereof in the causes therein entitled now in my custody in my office as the Clerk of the said Court.

In testimony whereof, witness my hand and the seal of the said Court, at Guthrie, Oklahoma Territory, this the 16th day of March, 1904.

[SEAL.] T. A. NEAL,
Clerk of the District Court of Logan County, Oklahoma Territory.
FLORENCE N. WEIRICK, *Deputy.*

Filed Mar. 16, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Said case-made is endorsed as follows, to wit: 1483. Southern Pine Lumber Co. *vs.* W. B. Ward *et al.* Filed March 16, 1904. Benj. F. Hegler, Clerk Supreme Court.

245 And afterward, on the 17th day of May, 1904, there was filed in said cause, proof of service of brief, which proof of service reads in words and figures as follows, to wit:

246 In the Supreme Court of the Territory of Oklahoma.

Cause Number 1483.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation, ET AL.,
Plaintiffs in Error,
vs.
W. B. WARD ET AL., Defendants in Error.

Proof of Service.

The undersigned defendants in error, by their attorneys, acknowledge the service by copy upon them respectively of the brief of the plaintiffs in error in the above entitled cause, this April 23rd, 1904.

GEO. W. BUCKNER,
Attorney for Defendant in Error, W. B. Ward.
F. H. PRENDERGAST,
Attorney for Defendant in Error,
G. M. D. Grigsby and D. J. Grigsby.
____ ____,
Attorney for Defendant in Error,
American Exchange Bank.
T. L. L. TEMPLE &
BENJ. WHITAKER,
Formerly Partners as the Southern
Pine Lumber Company.
AMERICAN EXCHANGE
BANK,
By GEO. R. LOCKWOOD, *Its Att'y.*

247 In the Supreme Court of the Territory of Oklahoma.

Cause Number 1483.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation, ET AL.,
Plaintiffs in Error,
vs.
W. B. WARD ET AL., Defendants in Error.

Affidavit.

TERRITORY OF OKLAHOMA, *Logan County, ss:*

T. F. McKennon, of lawful age, being first sworn upon oath, deposes and says:

That on the 23rd day of April, 1904, he mailed prepaid at the United States Post Office at Guthrie, O. T., copy of the brief of plaintiffs in error in said cause to the following named persons at their post office addresses as follows:

E. L. Blincoe, Guthrie, O. T.
J. W. McNeal, Guthrie, O. T.
Charles Griswold, Guthrie, O. T.
Hattie P. De Bois, Guthrie, O. T.
J. D. De Bois, Guthrie, O. T.

And affiant further says that he has made inquiry but has been unable to ascertain thereby the addresses of the following named defendants in error, but has mailed a copy of said brief to each of them, prepaid, at the Post office at Guthrie, O. T., addressed to them as follows:

Anna Bannister, Guthrie, O. T.
J. D. Elder, Guthrie, O. T.
William H. Dungan, Guthrie, O. T.

T. F. McKENNON.

Subscribed and sworn to before me this 25th day of April, 1904.

[SEAL.] CARRIE D. BROWN,
Notary Public.

My Commission expires Jan. 13, 1908.

Endorsed: No. 1483—The Southern Pine Lumber Co. *et al. vs.* W. B. Ward *et al.*—Proof of service of Briefs—Filed May 17, 1904, Benj. F. Hegler, Clerk Supreme Court.

248 And afterward, on May 19, 1904, a motion to dismiss was filed in said cause, which motion reads in words and figures as follows, to wit:

248*a* In the Supreme Court of the Territory of Oklahoma.

No. 1483.

THE SOUTHERN PINE LUMBER CO., a Corporation, ET AL., Plaintiffs in Error,
vs.
W. B. WARD ET AL., Defendants in Error.

Motion to Dismiss Proceedings in Error.

Buckner & Son, Attorneys for W. B. Ward.

Filed May 19, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court.
By —— ——, *Deputy.*

248*b* In the Supreme Court of the Territory of Oklahoma.

No. 1483.

THE SOUTHERN PINE LUMBER CO., a Corporation, ET AL., Plaintiffs in Error,

vs.

W. B. WARD ET AL., Defendants in Error.

Motion to Dismiss Proceedings in Error.

Comes now the defendant in error, W. B. Ward, and moves the Court to dismiss the proceedings in error in the above entitled cause, for the following reasons:

First.

Because after the case made (attached to the petition in error in the above cause) was signed and settled by Hon. John H.
248*c* Burford, trial judge, on to-wit the fifteenth day of March, A. D. 1904, the plaintiffs in error without authority, on to-wit the sixteenth day of March, 1904, wrongfully amended said case made by inserting a certificate and other statements therein, to-wit: A certificate of the clerk of the District Court of Logan County, Oklahoma, bearing date of the 16th day of March, 1904, to the effect that the purported copies of pleadings, judgments, orders, etc., contained in said case were true—see pages 103 and 104 of the case made. Second, by inserting between pages 87 and 88 of the case made, a statement which was numbered 87½, to the effect "all of said evidence so introduced at said trial in said action * * * are in words and figures as follows, to wit:

Second.

Because said case made does not affirmatively show that it contains all of the record in said cause, and all of the evidence before and considered by the Lower Court in the trial of said cause.

Third.

Because the statement wrongfully inserted after the case was settled by the trial judge (page 87½ case made) does not show that the case made contains all of the evidence.

248*d* Fourth.

Because no summons in error was issued in the above cause within one year from the date judgment therein, to-wit: March 16th, 1903, see page 168 case made, and the date of the summons in error in this

Fifth.

Because the case made in this cause was not served on a number of necessary parties to the controversy as follows, to-wit: F. E. Pentecost, trustee, in whom is vested the title to the property in contro-

versy by deed (case made, page 114) nor his legal representatives, nor W. H. Dungan, Anna Bannister, J. D. Elder, the Southern Pine Lumber Company, a partnership, or Grigsby Brothers, a partnership. See case made, page 168.

Sixth.

Because the petition in error does not make the following necessary parties, parties to the proceedings in error, to-wit: The American Exchange Bank of St. Louis, Mo., the plaintiff in case No. 1524, involved in this action; G. M. D. Grigsby and D. J. Grigsby, as individuals who filed the cross petition in the action in the Lower Court as individuals, and obtained the judgment complained of. (Page 49 C. M., page 168 C. M.)

248e Seventh.

Because no exceptions were ever taken or saved to either of the judgments rendered in said cause (see case made, pages 168 to 172 and 173 to 175 inclusive) hence there is nothing upon which counsel can base their motion for a new trial or demand a review of said judgments.

Eighth.

Because the judgments rendered in said cause were rendered on the 16th day of March, 1903, and no exceptions taken, and no case was made for this Court until the 15th day of March, 1904, and no order of court was made extending the three days' statutory time after judgment in which to make a case, before the expiration of said time; after which the Court had no authority to grant time to make a case.

Ninth.

Because the case made does not contain all of the evidence which was before the Lower Court in the trial of this cause in this; all of the record of the Lower Court in case No. 1524 was, as a matter of fact, produced to the Lower Court and examined and read by it, but the Stenographer did not get the offer in the record, and especially was a judgment in said cause setting aside the attachments
248f based on the affidavit of attachment in this cause, but whether or not the case made shows that this record evidence was introduced, it was involved in the Lower Court, and being a record of that Court, in which the Grigsbys and the plaintiffs in error were parties, the Court took judicial notice of the whole of the record and acted upon it, and it is properly a part of the evidence in this case and should be brought to this Court.

Tenth.

Because the Court rendered its judgments in this cause on the 16th day of March, 1903 (see case made, pages 168 and 173) and gave the plaintiffs in error 60 days in which to make and serve their case for this Court, and this time expired on the 15th day of May, 1903, and no extension of time to make the case was ever granted

until the first day of June, A. D. 1903 (see case made, page 180) at which time the Court had no authority to extend the time.

Appellants do not discuss error in overruling motion for a new trial.

Wherefore, defendant in error, W. B. Ward prays that the proceedings in error in this cause be dismissed and that he recover his costs herein.

BUCKNER & BUCKNER,
Attorneys for W. B. Ward.

248*g* *Argument on the Motion.*

Upon the first reason assigned for a dismissal of this cause, to-wit: The wrongful insertion in the case made of a certificate of the clerk, and statement of counsel, defendant in error respectfully calls the Court's attention to the signature of the judge to *to* the case made, page 103, which is dated March 15th, then to the certificate of the clerk pasted on the back thereof being date of March 16th, page 104 case made Such changing and tampering with cases made ought not to be permitted; it is a practice fraught with too many dangers.

Rullman *vs.* Bar, 54 Kan. 643-770.

"A certificate of the clerk of the District Court attached to a case made, after the same has been settled and signed, to the effect that all of the evidence produced upon the trial is included in such case made, is of no effect, and unless the case made which is served shows that evidence is preserved, the sufficiency of the same cannot be reviewed."

Dayton *vs.* Craig, 26 Minn., 133, I. N. W. 813.
Stewart *vs.* Springer, 41 Mo., 400.

248*h* The insertion of the statement of counsel between pages 87 and 88 of the case made, and numbering the page 87½ is just as unavailing as the certificate, and will not be reviewed.

Upon the second and third causes assigned for a dismissal defendant in error suggests after a careful examination of the record that there is no where in it contained an *affirmative statement* that the record contains all of the evidence; even the statement of counsel inserted as page 87½, as follows: "All of said evidence so introduced at said trial in said action, and the objections made and saved, and the orders and rulings of the Court, are in words and figures as follows," to-wit: Is not an affirmative statement of a fact, and is not equivalent to a statement that the case, as made, settled and signed by the Judge, contains all of the evidence produced to the Court below.

Moody *vs.* Arthur, 16 Kan., 419.

"Where the record reads that the plaintiff to maintain the issues on his part, offered testimony as follows, to-wit: then gives certain

testimony and adds here the plaintiff rests, shows the same as to defendant's testimony, but omits such statements as to testimony in reply of which the record contains some, and contains no *affirmative statement* that all of the testimony is contained in the record, and no other matter or statement tending to show such to be the
248*i* fact, held that it does not appear that all of the testimony on the trial is in the record and before us for consideration."

Greenwood *vs.* Bean, 20 Kan., 24.
Hale *vs.* Bridge Co., 8 Kan., 466.

Nor does a statement in the Judge's certificate that the record contains all of the evidence, cure the defect.

Eddy *vs.* Weaver, 37 Kan., 547.

See also cases in this court not yet reported, of

Exentine *vs.* Goldstein, No. 1173.
Oleogochlarger *vs.* Grell, No. 1390.

Upon the fourth cause assigned in the motion defendant in error refers the Court to the record, page 168, showing date of judgment March 16th, 1903, the filing of the case in this court March 16th, 1904, the date of the summons in error of March 16th, 1904, and the parties to whom it was addressed, and to the following authority:

Walton *vs.* Williams, 5 Ok., 642.

"A summons in error is not required to be issued within sixty days after the petition in error is filed in this Court. It is
248*j* required that the appeal shall be taken and perfected (which includes the issuing of summons in error) within one year from the rendition of the judgment appealed from."

The summons in error was not issued within a year from date of judgment in this case as against G. M. D. Grigsby and D. J. Grigsby, individually; they brought this suit and cross-petition as individuals and they hold the property as individuals. The summons in error issued March 16th, was directed alone to Grigsby Bros., a partnership long since expired. It appears that this old dissolved partnership entered an appearance on March 18th; but G. M. D. Grigsby or D. J. Grigsby have never entered an appearance, nor has any summons in error ever been issued directed to them or their attorneys.

Upon the fifth cause assigned that the case made was not served upon a number of necessary parties, to-wit: F. E. Pentecost, trustee, in whom the title to the property involved was vested by deed or his legal representatives, or W. H. Dungan, Anna Bannister, J. D. Elder, The Southern Pine Lumber Co., a partnership, or Grigsby Bros., a partnership, defendant in error refers the Court to the pages of the record referred to in the motion showing these facts and the following authorities:

248*k* On the point that Pentecost or his legal representatives should be made parties, served with case made, and made parties by petition in error, see

Kuhnert *vs.* Conde, 39 Kan., 265.

"After a judgment was rendered in the District Court in favor of the plaintiff, he died; and afterwards the defendant for the purpose of reversing the judgment, filed a petition in error and case in the Supreme Court, purporting to make the former plaintiff, and him only, the defendant in error, more than one year after the judgment was rendered, it was revived in the District Court in the names of the representatives and successors of the plaintiff, held that the proceeding in error in the Supreme Court must be dismissed for the reason that it was not legally brought in the Supreme Court, and there has at no time been any defendant in error."

On the point that Bannister, Elder, The Southern Pine Lumber Co., a partnership, Grigsby Bros., a partnership, and W. H. Dungan, should have been served with the case made, see

Hughes *et al. vs.* Miller *et al.*, 56 Kan., 183.

"When a review is sought upon a case made, it or a copy thereof must be served upon each adverse party or his attorney. A
248*l* failure to serve the case within the prescribed time upon one of such parties who might be prejudiciously affected by a modification or reversal of the judgment, defeats the jurisdiction of the Supreme Court, and requires a dismissal of the proceedings in error."

See opinion and cases cited.

Upon the sixth cause assigned that the petition in error does not make the following necessary parties to the case, parties defendant in error, to-wit: The American Exchange Bank of St. Louis, Mo., D. J. Grigsby and G. M. D. Grigsby. See petition in error.

Hodgson *vs.* Billson *et al.*, 11 Kan., 358.

Upon the seventh cause assigned, that no exceptions were taken to the judgments or either of them, and hence there is nothing for this Court to review. Defendant refers to the pages of the record cited in the motion, and the following cases upon the point that the case should be dismissed.

Tennile *vs.* Walsh, 81 Ala., 160, 1 So. 85.
Searey *vs.* Hogan Fed. Cas. No. 12584.
Dufield *vs.* Cross, 13 Ill., 699.
Kelly *vs.* Davis, 19 Kan. 510.

248*m* Upon the eighth cause assigned in the motion, to-wit: That the judgment was rendered on March 16th, 1903, and no case was made within the three days statutory time thereafter allowed in which to make the case, nor the time extended by the Court before the expiration of said time, presents an interesting question.

Okla. Stats. 1893, section 4444.

"The case made, or a copy thereof, shall within three days after the judgment or order is entered, be served, etc."

Section 4445 of same statutes gives the court power to extend the time, provided it acts before the time expires, for after the time once expires the Court has no authority to make an order extending the

time. The Court will bear in mind that no exceptions were taken to the judgment when rendered.

Guarantee Trust Co. *vs.* P. R. & N. E. R. R. Co., 160 N. Y., 6.

The time fixed by law in which to appeal from this judgment having expired at the end of three days thereafter, without an order being made extending the time, no future order of the court can give a right to appeal from, or review of the judgment. If the Court will read the opinion in the above case it will more clearly understand our position.

B'rd of Com'rs *v.* Hubble, 8 Ok., 209.

248*a* The case of Ingersoll *vs.* Yates, 21 Kan., 90 is a case directly in point sustaining the above view.

Upon the ninth cause assigned for dismissal, that the case as made does not contain all of the evidence, the fact is that all of the judgments, record and files in case No. 1524, out of which the action grew, were offered to and read by the Court, but the stenographer did not get the offer in the record; and especially was the judgment of the Lower Court in that case, which set aside the attachments in said cause, set up in the pleadings and read to the Lower Court; but even if the record in that cause which was the subject of this action was not introduced in evidence, it was a judgment of the Lower Court and referred to in the pleadings, and that Court did and would take judicial notice of the record, which this Court cannot do, and counsel having failed to bring up this evidence, this Court will not pass upon the questions discussed by them in their brief. See the pleadings and judgments in this cause and the following authorities:

Farrar *vs.* Bates & Co., 55 Texas, 193-200.

"The eighth assigned error is, the plaintiffs did not prove that they had any judgment against Dixon & Co., or that said Dixon & Co. were indebted in any amount whatever.

248*b* The record shows that the proceedings and judgment against Farrar as garnishee, were conducted as a part of the original suit of Bates & Co. *vs.* Dixon & Co. under the same number 1512, and the same style with the addition to the name of the original defendant, that of J. R. Farrar, garnishee. Farrar, as such garnishee, was summoned to answer in the original suit during its pendency and before judgment against Dixon & Co. by process which recited the pendency of the original suit, the parties thereto, style and number, and the description of the note upon which judgment was sought and subsequently obtained against Dixon & Co. The ultimate liability of Farrar depended upon the recovery of Bates & Co. of this judgment against Dixon & Co., and although it would have been more formal to have introduced that judgment in evidence, yet, under the circumstances we do not think that the Court below erred in taking judicial notice of its own judgment against Dixon & Co."

Dewey *vs.* St. Albans Trust Co., 12 Atlantic Rept., 224-227.

"It is claimed that the former adjudication can not be availed of here, though set up in the answer, because the record of it has not

been put in evidence. But this was not necessary. That decree was made in the present case, the whole record of which was be-
248p fore the Court of Chancery, and this appeal has brought it before this court, and the Court can properly look into it to see what has been done in the case without requiring proof in the ordinary way."

Armstrong *vs.* Colby, 47 Vt., 359.

"A Court may properly look into its own docket entries, to see what has been done by it in a case without requiring proof by the record written out at length, as would be necessary if proof of the proceedings were made in another Court."

Kendall *vs.* San Juan Silver M. Co. 9 Colo., 347, in which the pleadings are very similar to those in the case at bar—the Court says "The facts left in issue being facts of which the Court could take judicial notice, are deemed part of the pleadings, and not matter for evidence."

Burke *vs.* Territory, 2 Ok. 499-510.
Brucker *vs.* State, 19 Wis., 566.
State *vs.* Bowen, 16 Kan., 475.
Taylor *vs.* Adams, 115 Ill., 570.
Searls *vs.* Knap, 58 N. W., 807.
Robinson *vs.* Brown, 82 Ill., 279.
Jourdon *vs.* Circuit Court, 69 Iowa, 177.
248q State *vs.* Pastlewait, 14 Iowa, 446-459.
Hollenbach *vs.* Schnebal, 101 Cal., 512.
State *vs.* Lazarus, 1 Southern, 368.
Hunter *vs.* N. Y. O. & W. R. R. Co., 116 N. Y., 616.
Scerist *vs.* Petty, 109 Ill., 188.

In view of the fact that the whole of the record in cause No. 1521 was offered in evidence in the Lower Court, and the Court did as a fact examine the same, and took judicial notice of the record which was set up in the pleadings, and the plaintiffs in error having failed to bring said record to this Court, the case should be dismissed.

In the case of The Detroit T. & J. R. R. Co. *vs.* Crane, 50 Mich., 182, Judge Cooley says: "When a party seeks a ruling upon which to base an appeal, if it is wrong, he cannot rely upon the Judge's private knowledge of facts, but must bring them into the case in some authoritative and responsible form, so that they may become a part of the record for the purposes of the review;" which was not done in this case.

Upon the tenth cause assigned for a dismissal—that the judg-
ments were rendered March 16th, 1903—(see record referred
248r to in motion) at which time the Court gave the plaintiffs in error sixty days to make their case, meaning, of course, sixty days from March 16th, 1903, the date of the judgment. (See case made, pages 168-173.) Now the sixty days from March 16th 1903, expired on the fifteenth day of May, 1903, and no further extension of time was granted until June 1st, 1903, fifteen days after

the time had expired, hence the case made is void, and the proceedings in error should be dismissed.

Funstan *vs.* Fox, 51 Kan., 683.

"The trial was commenced on the 19th of April, 1889. The plaintiff's motion for a new trial is marked. 'Filed April 20th, 1889.' The journal entry of judgment and of the order overruling the motion for a new trial, bears date of April 19th. Plaintiff was then granted sixty days to make and serve a case. On June 13th an extension of thirty days was granted, and on July 19th a further extension of sixty days was given. This made the time for serving a case expire on September 17th. Service was made and acknowledged September 26th, 1889. This was too late, and the Judge had no authority thereafter to settle and sign it. It follows, therefore, that there is nothing here for our consideration. * * * The case is dismissed."

248 In conclusion we wish to say also that counsel does not discuss any error of the Lower Court in overruling his motion for a new trial in his brief, and for that reason under the rules of this court the cause should be dismissed. See

Carter *et al. vs.* The M. M. & Lbr. Co., 6 Ok., 11.

Respectfully submitted,

BUCKNER & SON,
Attorneys for W. B. Ward.

248½ *Service.*

I hereby Acknowledge Service of the Within Brief this — day of —— 1903.

——— ———,
Attorney for Defendant in Error.

249 And afterward, on the 23rd day of May, 1904, there was filed in said cause, a motion to dismiss, which motion reads in words and figures as follows, to wit:

250 In the Supreme Court of the Territory of Oklahoma.

No. 1483.

THE SOUTHERN PINE LUMBER CO. ET AL., Plaintiffs in Error,
vs.
W. B. WARD ET AL., Defendants in Error.

Motion to Dismiss Proceedings in Error by G. M. D. Grigsby and D. J. Grigsby.

F. H. Prendergast, Attorney, Marshall, Texas.

Filed May 23, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court.
By JESSIE PARDOE, *Deputy.*

251 In the Supreme Court of the Territory of Oklahoma.

No. 1483.

THE SOUTHERN PINE LUMBER CO. ET AL., Plaintiffs in Error,
vs.
W. B. WARD ET AL., Defendants in Error.

Motion to Dismiss Proceedings in Error by G. M. D. Grigsby and D. J. Grigsby.

F. H. Prendergast, Attorney, Marshall, Texas.

Now come the defendants in error, G. M. D. Grigsby and D. J. Grigsby, and move the court to dismiss the above cause now pending in this court on writ of error for the following reasons:

First.

Because no exceptions were served or taken by the plaintiffs in error to the judgment and decree that was rendered at the time said judgment and decree was rendered, and therefore they have no basis for their assignment of errors in this cause.

Second.

Because at the time said judgment and decree was rendered the plaintiffs in error did not present their "case made" within three days after the judgment was rendered, nor did they obtain an extension of time within three days, allowing for time in which to present and have settled their "case made."

Third.

Because the plaintiffs in error, after said judgment and decree was rendered, allowed that term of court to adjourn without presenting any "case made" and without having time granted in which to present and have settled their "case made," whereby the judgment and decree became final. The district court lost all authority to settle the "case made" after that date.

Fourth.

Even if it be considered and allowed that time was extended to the plaintiffs in error and to prepare and have settled their "case made," they did not prepare and have settled the same during the time allowed by their order extending the time, therefore said "case made" cannot be considered.

252 Fifth.

Said "case made" should be stricken out, and writ of error dismissed, because of the unusual and unnecessary delay on the part of plaintiff in error in preparing and having settled their "case made," said judgment having been rendered on the 15th day of March, 1903, and "case made" was not settled until the 15th day of March, 1904.

wherefore G. M. D. Grigsby and D. J. Grigsby now come and pray to the court to strike out the "case made" for want of the compliance with the requirements of law, and said cause be dismissed, and that they recover their costs.

Sixth.

These defendants in error hereby adopt and approve the motion to dismiss the proceedings in error in this cause filed herein by W. B. Ward, and without formality of copying, they now present and insist upon the grounds for dismissal for the reasons therefor presented in the said motion of W. B. Ward, appellee.

F. H. PRENDERGAST,
Attorney for G. M. D. Grigsby and D. J. Grigsby.

Reasons for Sustaining the Motion.

The record shows that the cause was tried on March 10th, 1903, and taken under advisement, and judgment was rendered on March 16th, 1903. (Record 168-173.) Motion for a new trial was made on March 17th and March 18th, 1903, (Rec. 163-165). Motion for new trial was overruled on the 4th day of April, 1903, and the appellants excepted to the order overruling the motion for new trial and at that time sixty days was granted to appellants to make and serve their "case made" to the Supreme Court. (Rec. 172.)

On June 1st, 1903, the time was extended sixty days. (Rec. 180.)

July 29th, 1903, time extended sixty days. (Rec. 182.)

September 24th, 1903, time extended thirty days. (Rec. 184.)

October 12th, 1903, "case made" served on Ward's attorney. (Rec. 187.)

October 15th, 1903, "case made" served on Grigsby's attorney. (Rec. 188.)

October 21st, 1903, time extended sixty days from October 24th, 1903. (Rec. 192.)

December 22nd, 1903, time extended sixty days. (Rec. 194.)

253 March 2nd, 1904, notice served on Ward's attorney and March 5th, 1904, notice served on Grigsby's attorney that appellant would settle "case made" on March 14th, 1904. (Rec. 197.)

On March 14th, 1904, the "case made" was presented to the judge, and on March 15th, 1904, was certified by him. (Rec. 203, which is erroneously marked as 103 in "case made.")

It will be observed from this summary, first, that if the first extension of time granted on the 4th of April, 1903, (Rec. 172) counted from the said 4th day of April, that the court had lost control of the case, because the extension of time had not been granted within three days from rendition of judgment on the 16th day of March, 1903, and if such extension related back to the day of the rendition of judgment, then the sixty days expired before the second extension, which was not granted until the 1st day of June, 1903, and when the extension had expired on the 15th day of May, the judgment became final. The Court lost its power to then prepare the case

for Writ of Error by settling the "case made." The extension was then regularly granted until December 22nd, which was the last extension that was granted, and lasted for sixty days, which sixty days expired by the 21st day of February, 1904, but the "case made" was not settled nor was the judge applied to for settlement until the 14th day of March, 1904. Hence, it came too late, as the extension expired the 21st of February previous.

The "case made" under the practice here, as I understand it, is in every respect the same as a bill of exceptions at Common Law, and the same rule should govern its preparation. Now, it is the settled law that a bill of exceptions must be settled, signed and filed during the term of court at which the judgment sought to be revised was rendered, or some order must be made during the term by which the trial court keeps the case open and retains control of it for a specified time, and this may be extended from time to time. But if ever you go above the time limit the right to have the bill settled is gone forever, except under very extraordinary circumstances.

Hume *vs.* Bowie, 148 U. S., 245.
Norse *vs.* Anderson, 150 U. S., 156.
Bank *vs.* Eldred, 143 U. S., 298.
Reliable Incubator Co. *vs.* Stahl, 102 F. R., 593, C. C. A.

The long delay in the preparation of the "case made" in the case now before us is without any excuse or reason whatever. Almost the entire record is composed of record evidence and documents. But a very small amount of evidence was taken orally at the trial, which will appear from an inspection of "case made." So there
254 & 255 is nothing that appeals to the Court to be lenient in this case in exacting a fair compliance with the requirements of the law. The Oklahoma statute, Sec. 4414, seems to imply that parties who desire to revise their case in Supreme Court must act promptly and with diligence, as it requires the parties seeking an appeal to prepare their cause within three days after judgment or order is entered, and if we enforce the spirit of that statute, we will find the Plaintiff in Error in this case without any excuse for tying up the matter for the entire twelve months after the decree was rendered, when other business had intervened and the matter, circumstances and facts had largely faded from the memories of those who participated in the trial, and who are called upon to prepare the cause so that this Court may readily understand the true issue involved.

We respectfully submit the motion and pray that the same be sustained.

F. H. PRENDERGAST,
Attorney for G. M. D. Grigsby and D. J. Grigsby.

256 And afterward, On the 1st day of June, 1904, there was filed in said cause an Amended Petition in error, which Amended petition reads in words and figures as follows, to wit:

257 In the Supreme Court of the Territory of Oklahoma.

Cause Number 1483.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation; T. L. L. TEMPLE, G. W. R. CHINN, and MRS. G. W. R. CHINN, Plaintiffs in Error,

vs.

W. B. WARD, THE SOUTHERN PINE LUMBER COMPANY, a Partnership Composed of T. L. L. Temple and Benjamin Whittaker; G. M. D. GRIGSBY and D. J. GRIGSBY, Partners as Grigsby Brothers; J. W. MCNEAL, CHARLES GRISWOLD, J. D. DE BOIS, HATTIE P. DE BOIS, J. D. ELDER, WILLIAM H. DUNGAN, ANNA BANNISTER, E. L. BLINCOE, and THE AMERICAN EXCHANGE BANK, a Corporation, Defendants in Error.

Amended Petition in Error.

Come now the said plaintiffs in error and each and all of them, namely, The Southern Pine Lumber Company, a corporation, and T. L. L. Temple, G. W. R. Chinn, and Mrs. G. W. R. Chinn, his wife, and respectfully ask leave of said Honorable Court to file this their amended petition in error in said cause, action and proceeding, and do herewith submit and file the same, and ask leave to attach hereto and make a part hereof the case made in said action, the same being also a transcript and ask leave that the same be made a part hereof, and hereby ask leave to make and do make The American Exchange Bank, a corporation, a defendant in error herein; and the said plaintiffs in error each and all of them complain of the said defendants in error, and each and all of them, for that the said defendants in error at the February term, 1903, of the District Court of Logan County, in the Territory of Oklahoma, did, by the consideration of said Court, recover certain judgments and obtain certain orders against these plaintiffs in error, in a certain action then pending in the said Court, wherein the defendant in error, W. B. Ward, was plaintiff, and the said plaintiffs in error, and the said other above named defendants in error were defendants.

258 The original case made in said action, duly certified, attested, settled and filed, the same being also a transcript, is hereto attached, marked "Exhibit A," and made a part of this amended petition in error.

These plaintiffs in error aver that there is error in the said record and proceedings, in this, to wit:

1. The said District Court erred in overruling the motions of the plaintiffs in error for a new trial.

2. The said District Court erred in not rendering judgment for these plaintiffs in error, and in not ordering, adjudging and decreeing in the said District Court, that the said plaintiff, W. B. Ward, and the said defendants, G. M. D. Grigsby and D. J. Grigsby, partners as Grigsby Brothers, and each of them, take nothing by said action, that the said action be dismissed, and that the costs thereof be taxed to the said plaintiff and said Grigsby Brothers, and

in not ratifying, confirming and approving the title of these plaintiffs in error in and to the real estate involved in said action, together with the tenements, hereditaments and appurtenances thereunto belonging and appertaining.

3. The said District Court erred in that the said judgments therein rendered and the said other orders therein, including the orders overruling the motions for a new trial and to set aside and vacate, the findings and judgments therein, and each of them, are contrary to law and not sustained by sufficient evidence and are contrary to the evidence and are contrary to equity.

4. The said District Court erred in overruling the demurrers of these plaintiffs in error to the petition in said action below, and to the answer and cross-petition, and each of them, of the said Grigsby Brothers in said Court below.

259 5. The said District Court erred in admitting evidence on the part of the plaintiff and the said other defendants in the said District Court.

6. The said District Court erred in refusing and ruling out competent and legal evidence on the part of these plaintiffs in error.

7. The said District Court erred in not finding, holding, ordering, adjudging and decreeing that the plaintiff in said District Court has no claim, lien, demand or security of any kind upon the premises involved in said action.

8. The said District Court erred in not finding, holding, ordering adjudging and decreeing that the said Grigsby Brothers, and each of them, be barred from asserting any title to the real premises involved in said action, and be divested of all title thereto.

9. The said District Court erred in permitting the attack which was made and a collateral attack upon the pleadings, papers, files, proceedings, orders and judgment in a certain former action wherein the defendant in error, The American Exchange Bank, was plaintiff, and the Southern Pine Lumber Company, *et al.*, were defendants.

10. The said District Court erred in holding the said judgment in said former action invalid upon direct, or any other, attack.

11. The said District Court erred in not ascertaining the status and condition of the said real premises with reference to improvements and buildings thereon, and in not requiring the plaintiff and said Grigsby Brothers to do equity and to pay for said improvements, and in not applying the laws of the Territory of Oklahoma to said action.

Wherefore, the plaintiffs in error, and each of them, pray that said orders and judgments, and findings, and holdings, and each and every adverse finding, holding, order and judgment in said action so rendered may be reversed, set aside and held for naught, and that a judgment may be ordered to be rendered in favor of these plaintiffs in error, and against the defendants in error, and that

260 the plaintiffs in error be restored to all rights they have lost by the rendition of said judgments and orders, and for such further relief as to the Court may seem just.

J. D. COOK AND
COTTERAL & HORNOR,
Attorneys for Plaintiffs in Error.

The undersigned American Exchange Bank, as one of the defendants in error in the foregoing entitled proceedings in error in the Supreme Court of the Territory of Oklahoma hereby:

1. Acknowledges personal service of the foregoing amended petition in error and waives objections to the filing thereof at any time;

2. Consents that said Bank may be forthwith and at any time made and named as an additional defendant in error in said cause;

3. Consents that said cause be fully heard, determined and decided in all respects the same as if it had been made and named as defendant in error therein when the original petition in error was filed therein, and waives all objection thereto.

4. And enters anew its voluntary general appearance in said cause.

Dated this May 26th A. D., 1904.

AMERICAN EXCHANGE BANK,
Defendant in Error,
By WALKER HILL, *President.*
GEO. R. LOCKWOOD, *Its Attorney.*

Filed June 1, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Endorsed: Cause No. 1483—In the Supreme Court—The Southern Pine Lumber Company *et al. vs.* W. B. Ward *et al.*—Amended Petition in Error—Filed June 1, 1904, Benj. F. Hegler, Clerk Supreme Court, By Jessie Pardoe Deputy.

261 And afterward on the 1st day of June, 1904, there was filed in said cause a supplemental motion to dismiss, which motion reads in words and figures as follows, to wit:

262 In the Supreme Court of the Territory of Oklahoma.

Case No. 1483.

THE SOUTHERN PINE LUMBER COMPANY ET AL., Plaintiffs in Error,
vs.
W. B. WARD ET AL., Defendants in Error.

Supplemental Motion to Dismiss.

Comes now the defendant in error, W. B. Ward, and moves the Court to dismiss the proceedings in error in the above entitled cause for the following additional reasons, to wit

Because no summons in error was ever personally served on this defendant in error or any of his attorneys of record. Nor has service of Summons in said cause ever been attempted to be made by publication as against this defendant in error or his attorneys of record herein.

Therefore this Court has no jurisdiction to disturb the judgments in the above entitled cause, and in support of this motion the defendant in error herewith filed the affidavits of C. E. Carpenter, Sheriff of Logan County, Oklahoma Territory, and the affidavit of his Attorney of record, Geo. W. Buckner, and marks said affidavits "Exhibits A" and "B" and makes them a part of this motion.

Wherefore, defendant in error prays that the proceedings in error be dismissed and that he recover his costs.

W. B. WARD,
Defendant in Error,
By GEO. W. BUCKNER,
His Attorney.

263 TERRITORY OF OKLAHOMA, *County of Logan, ss:*

Geo. W. Buckner being duly sworn says that he is the attorney for W. B. Ward in the above cause, that he has read the above motion and knows of his personal knowledge that his allegations therein contained are true.

GEO. W. BUCKNER.

Subscribed and sworn to before me this the 1st day of June, 1904.

BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

Endorsed: # 1483.—The Southern Pine Lumber Co., Plaintiff in error, *vs.* W. B. Ward *et al.*, Defendants in error—Supplemental Motion to Dismiss—Filed June 1, 1904, Benj. F. Hegler, Clerk Supreme Court, By Jessie Pardoe, Deputy.

264 In the Supreme Court of Oklahoma Territory.

Case # 1483.

THE SOUTHERN PINE LUMBER COMPANY ET AL., Plaintiffs in Error,
vs.
W. B. WARD ET AL., Defendants in Error.

Affidavit.

TERRITORY OF OKLAHOMA, *Logan County, ss:*

C. E. Carpenter, Sheriff of said County and Territory being first duly sworn on oath says: That on the 16th day of March A. D. 1904, a summons in error in the above entitled cause was issued out of the above court, directed to him to serve certain persons therein named, that affiant served some of the persons named and made a return of said summons on the 24th day of March, 1904. But affiant says that he did not serve said summons on defendant in error, W. B. Ward, nor did he serve said summons in error on G. W. Buckner, the attorney for W. B. Ward, nor did he serve said

summons on the firm of Buckner & Son, attorneys or either member of said firm, and further affiant saith not.

C. E. CARPENTER,
Sheriff of Logan County, O. T.

Subscribed and sworn to before me this 1st day of June, 1904.

BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

We, Cotteral & Hornor, Att'ys for plaintiffs in error, in this cause hereby accept service of this motion to dismiss appeal and acknowledge the receipt of a copy of the same this 31st day of May, 1904.

COTTERAL & HORNOR,
Attorneys for Plaintiffs in Error.

Endorsed: 1483—The So. Pine Lbr. Co. *et al. vs.* W. B. Ward *et al.*—Motion to dismiss Appeal—Filed June 1, 1904, Benj. F. Hegler, Clerk Supreme Court.—Geo. W. Buckner, —.

265 And afterward, on the 6th day of June, 1904, there was filed in said cause, a motion to quash *alias* summons, which motion reads in words and figures as follows, to wit:

266 In the Supreme Court of the Territory of Oklahoma.

No. 1483.

THE SOUTHERN PINE LUMBER COMPANY ET AL., Plaintiffs in Error,
vs.
W. B. WARD ET AL., Defendants in Error.

Motion to Quash Alias Summons.

Comes now W. B. Ward, defendant in error, and appears specially for the purpose of this motion and moves the Court to quash, set aside and hold for naught the *alias* summons issued in the cause on, to wit: the first day of June, A. D., 1904, as against this defendant in error and his attorney Geo. W. Buckner, which *alias* summons was served on said attorney on the 2nd day of June, A. D., 1904, by delivery of a certified copy of said *alias* summons, said copy so served being hereto attached and made a part of this motion, marked "Exhibit A," because said defendant in error says:

That the judgment in the above entitled cause was rendered on the 16th day of March A. D., 1903, and the motion for a new trial in said cause was overruled on the 4th day of April A. D., 1903, and because this "alias summons" was not issued until the first day of June, A. D. 1904, and not within one year from the date of any order made in this cause by reason whereof the Court has no jurisdiction to entertain said appeal.

Wherefore, defendant in error prays that this cause be dismissed and said "alias summons" be quashed, and for all proper relief.

BUCKNER & BUCKNER,
Attorneys for W. B. Ward.

267 Copy.

UNITED STATES OF AMERICA, *Territory of Oklahoma*, ss:

Supreme Court.

The Territory of Oklahoma to the Sheriff of Logan County, Greeting:

You are hereby commanded to notify W. B. Ward, defendant in error and Geo. W. Buckner, his attorney of record, that The Southern Pine Lumber Company *et al.*, Plaintiff- in error did on the 16th day of March A. D., 1904, file in the Clerk's office of the Supreme Court of Oklahoma Territory a petition in error and transcript of record, or case-made, the object of which is to obtain a reversal of a certain judgment rendered by the District Court sitting within and for the County of Logan, and Territory of Oklahoma, in an action pending before said Court wherein the said defendant in error W. B. Ward was plaintiff and the said plaintiff in error — other defendants in error, were defendants.

You will make due return of this Summons in Error on or before the 7th day of June A. D., 1904.

Witness my Hand and the Seal of the Supreme Court, affixed hereto, at my office in Guthrie, this 1st day of June A. D., 1904.

[SEAL.] BENJ. F. HEGLER,
Clerk Supreme Court.
—— ——, *Deputy.*

Exhibit "A."

[Endorsed:] (Copy) No. 1483. Supreme Court Territory of Oklahoma. Southern Pine Lumber Co. *et al.*, *vs.* W. B. Ward *et al.* Alias Summons in Error. Issued June 1 1904 Returnable June 7 1904 I hereby certify the within to be a true copy of the Original Writ, with all the endorsements thereon. C. E. Carpenter, Sheriff. C. S. Nelson, Deputy. J. D. Cook and Cotteral & Hornor, Attorney-for Plaintiff in Error.

268 *Authorities in Support of Motion to Quash.*

This court has no jurisdiction of the appeal unless the summons in error was issued within one year from the rendition of the judgment.

Walton *vs.* Williams, 5 Ok., 642.

An *alias* summons issued more than a year after the rendition of the judgment confers no jurisdiction on this court.

Republican Valley R. Co., *vs.* Sayer, 13 Neb., 280-13 N. W., 404.

"Jurisdiction. Where an *alias* summons was issued and served after the expiration of a year from the rendition of the judgment held, it gave the Court no jurisdiction."

To the same effect see:

Baker *vs.* Sloss, 13 Neb., 230-13 N. W., 212 and cases cited.
Bowen *vs.* Bowen *et al.*, 36 Ohio St. 312.

This court has no jurisdiction to consider any question in this case.

Wiley *vs.* Neal, 37 N. W., 926.
Elliott's Appellate Practice, Secs. 144-173.

The motion of defendant in error to dismiss for want of service now pending is confessed by plaintiffs in error's attempt to procure service by *alias* summons. See:

Segar *vs.* Muskegon S. & L. Co., 45 N. W., 982.

Respectfully submitted,

BUCKNER & BUCKNER,
Attorneys for Defendant in Error.

Endorsed: No. 1483, So. Pine Lbr. Co. *et al. vs.* W. B. Ward *et al.*—Motion to Quash Summons in error—Filed June 6, 1904. Benj. F. Hegler, Clerk Supreme Court, By Jessie Pardoe, Deputy. We, Cotteral & Hornor, Att'ys for plaintiffs in error, hereby accept service of the motion to quash summons in error and receipt of a copy of same this 4th day of June, 1904. Cotteral & Hornor, Att'ys for Plaintiffs. Filed June 6, 1904. Benj. F. Hegler, Clerk Supreme Court, By Jessie Pardoe, Deputy.

269 And afterward, at the June Term of said Supreme Court, on the Seventh day of June, 1904, the following proceeding was had in said cause, to wit:

#1483.

THE SOUTHERN PINE LUMBER COMPANY ET AL., Plaintiffs in Error,
vs.
W. B. WARD ET AL., Defendants in Error.

Ordered by the Court, that this cause be now taken on motions to dismiss and quash.

270 And afterward, at the June Term, 1904, of said Supreme Court, on the Ninth day of June, 1904, the following proceeding was had in said cause, to wit:

#1483.

THE SOUTHERN PINE LUMBER COMPANY ET AL., Plaintiffs in Error,
vs.
W. B. WARD ET AL., Defendants in Error.

Ordered by the Court, that the motion to dismiss be taken with the record, the cause submitted on record, briefs, with leave to defendant in error to file briefs; plaintiff in error to have five days from service thereof for reply briefs.

271 And afterward, at the June, 1905, Term of said Supreme Court, on the Seventh day of September, 1905, the following proceeding was had in said cause, to wit:

#1483.

THE SOUTHERN PINE LUMBER COMPANY ET AL., Plaintiffs in Error,
vs.
W. B. WARD ET AL., Defendants in Error.

And now this cause comes on for final decision and determination by the Court upon the record and briefs submitted therein.

And the Court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, at the cost of plaintiffs in error.

It is therefore ordered and adjudged by the Court, that the judgment of the lower court in this cause be and the same is hereby affirmed, at the cost of plaintiffs in error.

Opinion by Gillette, J. All the Justices concurring except Burford, C. J., who presided at the trial of the cause in the court below, not sitting.

Which opinion reads in words and figures as follows, to wit:

272 No. 1483.

In the Supreme Court of the Territory of Oklahoma, June Term, 1905.

Filed Sept. 7, 1905.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation, ET AL., Plaintiffs in Error,
vs.
W. B. WARD ET AL., Defendants in Error.

Syllabus.

1. Practice—Case made, amendment.—Where counsel for plaintiff in error attached to a case made, after the same has been settled and signed by the court, a certificate of the clerk that the copies of documents therein contained from his office are true and correct, such certificate is not an amendment of the case made and can have no office with reference thereto unless such case made should at some time be used as a transcript.
2. Same—Statement of contents.—Where it is shown by a case made that "all of said evidence so introduced at said trial in said action and the objections made and exceptions saved, and the orders and rulings of the court are in words and figures as follows, to wit:" such declaration is a sufficient statement that the record contains all of the evidence.

3. Same—Time of filing case made.—Where a judgment was rendered March 16, 1903, and a case made has been settled, signed and filed in the Supreme Court, March 16, 1904, the same is filed within one year under the rule fixed by the statute of Oklahoma, which provides that 'in the computation of time the first day shall be excluded and the last day included.'
4. Where judgment was entered on the 16th day of March, 1903, and a motion for a new trial was made and filed the next day and considered and overruled April 4, 1903, at which time appellants were allowed 60 days in which to make and serve a case made, the time so allowed commenced to run from the said 4th day of April.
5. Parties.—In an appeal to the Supreme Court from a determination of a District Court, persons not affected by or interested in the result need not be made parties.
6. Where a judgment is entered in the court below without exception, and a motion for a new trial is thereafter filed within three days, setting forth error in the proceeding by which judgment was obtained, the allegations of the motion for a new trial are a sufficient exception to bring before the court the questions of error raised by the motion, and if upon a hearing of said motion the grounds thereof are found to be well taken, the trial court or an appellate court upon appeal has jurisdiction to reverse or modify the judgment complained of.
7. A motion to dismiss a case made upon the ground that all the records are not therein contained which were produced to the lower court and examined and read by it, cannot be raised for the first time in the appellate court, and will not be considered unless the court can determine from the record that evidence before the lower court has not been preserved in the record. A declaration in the case made that it contains all the evidence, and a certificate of the lower court to the same effect, is sufficient, unless the contrary is manifest from the record itself.
8. Collateral attack.—Where an action has been brought to foreclose a trust deed and a defendant therein pleads a superior title in himself under and by force of a prior judgment in the same court, and a codefendant answers admitting the plaintiff's cause of action upon the trust deed, and shows that he was the party who executed the same and owned the property, and still is the owner of the equity therein subject to the plaintiff's right under said trust deed, and by way of cross petition shows that his codefendant had acquired no title under and by force of such former judgment for the reason that the court rendering such prior judgment did not have jurisdiction of the parties, such pleading is a direct and not a collateral attack upon such prior judgment, and where in such case the rights of the parties depend upon the validity or invalidity of such prior judgment, the question thus presented may be tried and determined, and the rights of the parties duly adjudicated.

9. The jurisdiction of any court exercising authority over any subject may be enquired into in every other court when the proceedings of the former are relied on and brought before the latter by a party claiming the benefit of such proceeding. (Following Elliott *v.* Pearsoll, 26 U. S., 329.)
10. A judgment of a court of a sister state shown to have been paid in full upon execution to the sheriff holding the same, is fully and completely satisfied, and cannot thereafter be made the basis of an action in this Territory.
11. Where an unauthorized person brings an action in the name of a party who has not consented thereto, such action is fictitious, and the court does not acquire jurisdiction of the plaintiff named, or of the subject-matter and any judgment rendered in such proceedings is void.

Error from the District Court of Logan County.

Jno. H. Burford, Trial Judge.

Affirmed.

J. D. Cook, Harper S. Cunningham, and Cotteral & Hornor, for plaintiffs in error.

F. H. Prendergast, for defendants in error Grigsbys.

Buckner & Son for defendant in error W. B. Ward.

Statement of Facts.

This action was commenced in the District Court of Logan County, by the defendant in error, W. B. Ward, May 5, 1900, against S. E. Pentecost, trustee, *et al.*, praying for foreclosure of a trust
273 deed and sale of the property described in said trust deed to satisfy debt in the sum of $11,082.50.

The petition avers the said deed of trust was executed by Grigsby Bros., a copartnership of Marion County, Texas, composed of D. J. and G. M. Grigsby, to S. E. Pentecost of Guthrie, trustee, to secure an indebtedness of said partnership in the sum of $7,000 to the National Bank of Jefferson, at Jefferson, Texas. That the note and trust deed had been sold and assigned by the National Bank of Jefferson *ante diem* to the plaintiff W. B. Ward, before maturity; that the same was due and wholly unpaid, and that the sum of $11,082.50 for principal, interest and penalty, was due thereon at the time of bringing the action. That the defendant Southern Pine Lumber Co., a corporation, the Southern Pine Lumber Co., a partnership, J. W. McNeal, Charles Griswold, Hattie P. De Bolt, J. D. Elder, Wm. H. Dungan, C. W. R. Chinn, and Mrs. C. W. R. Chinn claim to have some interest in the property included in said trust deed, but that they were mere trespassers upon the property, and had no legal or equitable claim thereto; and upon information and belief plaintiff averred that the title or claim of the last above named defendants was based upon a sale of said property at an execution sale of the same by virtue of an execution issued out of the District

Court of Logan County, Oklahoma Territory, on a judgment of said court, in cause No. 1524 therein, in favor of the American Exchange Bank, a corporation, of St. Louis, Mo., against T. L. L. Temple and Benjamin Whitaker, partners, as the Southern Pine Lumber Co., the Southern Pine Lumber Co., a corporation of Arkansas, D. J. Grigsby, G. M. Grigsby, T. L. L. Temple, Partners, under the firm name and style of the Union Lumber Mills Co., which judgment bore date of March 2, 1895, sale being made thereon July 18, 1895. That neither the plaintiff nor the National Bank of Jefferson, the *cestui que trust*, or S. E. Pentecost, trustee, were made parties to said action No. 1524, and that neither the plaintiff nor defendant in said case No. 1524, had or has any interest whatever in the property sold to satisfy the judgment, and that this plaintiff at the time said suit was filed and at all times since has held the legal title to said property by virtue of said trust deed, which was of record in the several counties in which said property was situated; that the sheriff of the several counties who sold said property on said judgment in said action No. 1524, together with the plaintiff and defendants in said cause, and the purchasers at said sale each had actual and constructive notice of the trust deed herein proceeded upon, and that plaintiff's title to said land was an unbroken chain. The plaintiff then avers that all proceedings had in said cause No. 1524 were null and void for want of notice to S. E. Pentecost, trustee, who was a resident of Guthrie, O. T., the *cestui que trust* named, or this plaintiff, and because no service was ever had, made or procured, upon or against any of the defendants in said action for the reason that the attempted service by publication was void.

To the petition of plaintiff the defendant The Southern Pine Lumber Co., T. L. L. Temple, G. W. R. Chinn and Mrs. G. W. R. Chinn, filed joint answer, admitting that Grigsby Bros. became indebted to the National Bank of Jefferson, Texas, and that a trust deed was executed to S. E. Pentecost, trustee, to secure such indebtedness, and that such trust deed covering the property involved in this action has never been discharged, but deny that the note of Grigsby Bros. to the National Bank of Jefferson, or the trust deed executed to S. E. Pentecost as trustee, was ever sold by the National Bank of Jefferson or its trustee for a valuable consideration to the plaintiff W. B. Ward, and they further deny that a sale of said instruments were ever legally made and completed either before or after the maturity of said note, and deny the transfer in good faith of the said deed of trust for valuable consideration, and deny any interest of the plaintiff Ward, either legal or equitable, in either said note or trust deed herein sought to be foreclosed, and deny that there is due and unpaid on said note the sum of $5,000, or any other sum, and deny that there is any amount or claims due to the plaintiff or any other person from Grigsby Bros. by reason of the execution
274 of said note to the National Bank of Jefferson, Texas, or on account of the deed of trust executed to S. E. Pentecost trustee. And for affirmative answer to the plaintiff's petition, the defendants set out that said note has been fully satisfied by payments to parties holding the same as legal representatives of the Bank of

Jefferson, and that said note and security having passed by delivery to the receiver of the National Bank of Jefferson, and in his hands compromised and paid off by Grigsby Bros. by the payment of a sum less than its face value, and that upon such payment made by the said Grigsby Bros. said note was surrendered to them, and said deed of trust was assigned to them in blank after said note secured by said trust deed had been paid as aforesaid.

The answer of defendants alleges that G. W. R. Chinn and Mrs. Chinn, through T. L. L. Temple, have a complete and perfect title to the Oklahoma City property mentioned in said trust deed, save and except the cloud existing by reason of said trust deed; and the Southern Pine Lumber Company have a perfect title to all of the property described in said trust deed situated in the city of Guthrie.

The defendant for further answer states that the American Exchange Bank brought in the District Court of Logan County, O. T. an action No. 1524, the amended petition therein being filed on the 17th of December, 1894, against T. L. L. Temple and Benjamin Whitaker, partners, as the Southern Pine Lumber Co., the Southern Pine Lumber Co., a corporation of Arkansas, D. J. Grigsby, T. L. L. Temple and G. M. D. Grigsby partners of the firm name and style of the Union Lumber Mills Co., and that judgment was entered in said cause March 2nd, 1895, and that this property was levied upon and sold on the 18th of July, 1895, and further alleges that said sale was made so as to dispose of all the interests held by D. T. Grigsby, G. M. D. Grigsby and T. L. L. Temple, partners under the firm name of the Union Lumber Mills Co. The defendants then aver that only the naked legal title to said property remained in said trustee Pentecost, with no rights therein except his charges and costs which the defendants then tender into court. That the plaintiff had never been known to any of the parties to these transactions save to the Grigsby Bros. they holding after settlement, the note given to the Jefferson County Bank and trust deed assigned in blank, both of which had served their purpose and been satisfied save upon the record: and as defendants verily believe suit thereon was brought by the plaintiff at the solicitation of Grigsby Bros., in this action: that there being no legitimate lien against said property by virtue of said trust deed, the same having been satisfied should be cancelled, and that the trustee Pentecost should be directed by the court to satisfy the same, and plaintiff's petition be dismissed, and the property decreed to be in defendants, and for such further order as may quiet the title in the respective defendants.

To the petition of the plaintiff, and by way of cross bill to the answer of the defendants, other than themselves, the defendants G. M. D. and D. J. Grigsby pleaded admitting that they made the note and trust deed sued on, and admitting the allegations of plaintiff's petition that the note to secure which the trust deed had been executed, and the trust deed had never been paid cancelled or released, and that five thousand dollars interest and attorneys' fees were due and unpaid thereon, and admitted that plaintiff W. B. Ward was the legal owner and holder of the note and trust deed, by

assignment from the Jefferson National Bank of Jefferson, Texas, through H. F. Austen, receiver, who acted under orders of the Comptroller of the Currency, and the law governing national banks, and who had no other right or interest in said note. In response to the answer of defendants other than themselves and by way of cross bill, the defendants Grigsby and Grigsby allege and say that they each have been and are now *bona fide* citizens of the state of Texas; that their interests in the property involved is the equity therein after satisfying the demands of the plaintiff upon the note and trust deed aforesaid; that about July, 1891, the Union Lumber Mills Co., a copartnership composed of D. J. and G. M. D. Grigsby and T. L. L. Temple, and T. L. L. Temple personally, and the Southern Pine Lumber company, copartnership, made and delivered to the
275 American Exchange Bank of St. Louis its obligation in writing, which obligation was not paid, and said bank brought suit thereon in the District Court of Dallas County, Texas, and on the 9th day of January, 1892, recovered judgment against each of the obligors above named, upon which execution was issued February 7, 1892, which was by T. L. L. Temple, judgment debtor aforesaid, paid and satisfied in full; after the payment of which, without demand for accounting or contribution the said Temple, or the said Southern Pine Lumber Co., copartnership, or as a corporation, without right or authority in fact or in law, in the name of the said American Exchange Bank of St. Louis, Mo., filed suit in the District Court of Logan County, O. T., against T. L. L. Temple and Ben Whitaker, partners, as the Southern Pine Lumber Co., the Southern Pine Lumber Company incorporated in Arkansas, and D. J. and G. M. D. Grigsby, and T. L. L. Temple, partners under the firm name of Union Lumber Mills Co., and caused attachment to be levied upon the property involved herein. That none of the defendants named in said suit, either individually or in their partnership or corporate capacity, made any appearance in said suit. On the 17th of December, 1894, an amended petition was filed in said cause and on the 2nd day of March, 1895, judgment was rendered therein. This action was cause No. 1524 of the District Court of Logan County, O. T. In July thereafter an amended judgment was entered in said cause, covering all the property involved in this action, under which said property was sold and the Southern Pine Lumber Co., either as a partnership or as a corporation, purchased the same at sheriff's sale. The defendants Grigsby and Grigsby aver that they challenge the sufficiency and legality of each and all of the proceedings in said cause No. 1524, and by their answer intend to and do directly attack as null and void, not due process of law, and as an actual fraud upon them and a fraud and imposition upon the court, each and all proceedings had in said cause. Said judgment and proceedings are declared to be void because said Texas judgment was fully paid off and discharged when suit No. 1524 was brought. That it was brought in the name of the American Exchange Bank without the knowledge or authority of said bank, was brought by said Temple individually or as the then

sole owner of the Southern Pine Lumber Co., a copartnership, and was therefore the real beneficiary in said suit using the name of the American Exchange Bank as plaintiff without its knowledge or consent, to avoid appearing in the capacity of both plaintiff and defendant. That as to G. M. D. Grigsby, the judgment is without pleading and void. That the Southern Pine Lumber Company, a corporation of Arkansas, made defendant in suit No. 1524, was not organized until September, 1892 and was not therefore in any wise liable on the Texas judgment, and was a fictitious party to said action. That the item in suit No. 1524 showing an account for $294.56 was not included in or a part of the Texas judgment, and was as alleged an account owing by the Union Mills Lumber Co. to the Southern Pine Lumber Company. That the American Exchange Bank, plaintiff in said suit No. 1524 never was the owner of said account, and was without knowledge thereof, and never at any time authorized an action to recover therefor in its name, and the court was therefore without jurisdiction to issue any process or render any judgment therein, and that it was in fact an indebtedness arising wholly outside of the Territory of Oklahoma. That the service was by publication, was not made as required by law, and defendants D. J. and G. M. D. Grigsby never had notice either actual or constructive of the pendency of said action No. 1524, and for that reason made default therein. That the writs of attachment issued after the 17th day of December, 1894, were issued without affidavits to support them, affidavits filed prior thereto, and prior to the 17th of December, 1894, having been set aside by order of the court when an amended petition was authorized to be filed. The service by publication was void because the affidavit therefor did not show or allege that the defendants summoned thereby were non residents of the Territory, or that with due diligence they could not be served therein. That the defendants Grigsby were able and would have paid T. L. L. Temple their *pro rata* share of the Texas
276 judgment had the fact of his payment been brought to their notice, but that the said Temple concealed the fact of such payment with the intent and purpose to cheat and defraud these defendants by the institution of said suit No. 1524, the bringing of which in the name of the American Exchange Bank of St. Louis, as well as the suing out of writs of attachment on behalf of a plaintiff which had no knowledge of the bringing of the action or interest in the subject matter thereof, was a fraud and imposition both upon these defendants and the court, and was further a fraud because said Texas judgment had been fully paid to the American Exchange Bank by one of the judgment debtors therein, and said judgment would thereafter support no action except for contribution between the several judgment debtors, and that therefore all judgments, decrees or sales in said action 1524 were illegal, and void; and the defendants Grigsby pray that the same may be declared void and of no force or effect, and that they be by order of the court held to have a direct interest in said property, subject to the payment of the plaintiff's note and deed of trust, and to the end that

upon the payment of the said note and deed of trust their title in and to the property described therein shall be and remain unclouded by the judgment and proceedings in said cause No. 1524.

The defendants Grigsby in addition to the allegation of the foregoing cross petition say that the indebtedness paid by Temple in paying the Texas judgment was a debt wholly due from him, primarily; that the Union Mills Lumber Co. executed two notes to the American Exchange Bank, one for $884.90, which was endorsed by T. L. L. Temple, the other for double that sum, was endorsed by the Grigsbys they receiving the proceeds of the one note they endorsed and Temple the other. That each took the proportion of money due them as partners in the Union Lumber Mills Co. That Grigsbys paid their proportion, but that the amount Temple was primarily liable for went to judgment in the Dallas, Texas, judgment hereinbefore referred to, which judgment was made the basis for the said action No. 1524. That if the debt sued on in No. 1524 is held to be just, they stand ready to pay such portion of the same as their interest in the Union Lumber Mills Company would represent. They further allege that T. L. L. Temple, acting as the Southern Pine Lumber Co. purchased the property at sheriff's sale, and that because of his fraudulent acts in procuring the judgment upon which the property was sold, he should be decreed to hold in trust for these defendants Grigsbys, to the extent of their interest before the sale, if in the judgment of the court the title of said Temple by virtue of such sale may not be held void. That the title of defendants Chinn and Chinn is tainted with Temple's fraudulent acts, and that they purchased from Temple with full knowledge of the fraud and without paying a valuable consideration, and ask that the title of each one of the defendants claiming adversely to themselves be divested by decree of the court, and set aside as a cloud upon the title of the Grigsbys.

To this cross complaint of Grigsbys a general denial was filed by the defendants Temple, Chinn and Chinn and the Southern Pine Lumber Co. A trial was had in the District Court of Logan County, without a jury, resulting in a judgment and decree holding the title of defendants acquired by purchase at the sheriff's sale upon the execution to satisfy the judgment in case No. 1524, and all the proceedings in said case void, and decreeing the legal title to the property involved to be in the defendants Grigsby, and quieting the title in them; subject, however, to the lien of the plaintiff Ward, which is found to amount to $5797.00, which lien of the plaintiff Ward was foreclosed, and a sale of the property involved was ordered to satisfy said lien. The defendant Southern Pine Lumber Co., a corporation, and the Southern Pine Lumber Co., a copartnership, T. L. L. Temple individually, and C. W. B. Chinn and Mrs. C. W. B. Chinn filed motions for new trial, which were by the court considered and overruled, and the said defendant moving for a new trial, now brings the case to this court for review upon error.

The opinion of the court sufficiently shows all other and necessary facts to a complete understanding of the case.

277 Opinion of the court by GILLETTE, *J.*:

In the consideration of this case we have first presented for the determination of the court, certain motions to dismiss the petition in error, filed by the defendants in error, Ward and G. M. D. Grigsby and D. J. Grigsby.

As the motion filed on behalf of Grigsby and Grigsby adopts and approves the motion to dismiss filed by defendant in error Ward, we will determine the motion upon the grounds stated in his motion.

The first ground is that as the case made was signed and settled by the trial judge March 15, 1904, the plaintiff in error amended it by inserting therein a certificate of the clerk of the district court to the effect that purported copies of pleadings, judgments, orders, etc., contained in said case made were true; second, by inserting at page 871g of the case made a statement that "all of said evidence so introduced at said trial * * * are in words and figures as follows."

We have examined the case made at page 871g of the record as well as the record, and are unable to determine therefrom that it was "inserted" in the case made or to verify from anything that appears of record, the allegations of the motion. There is nothing connected with page 871g of the record that could justify a statement that it was not there at the time the trial judge settled and signed the case, the same as it is at the present time, and must therefore be treated as a part of the case made, which was settled and signed by the trial court; and with reference to the certificate of the clerk at page 104, being the last page of the record, and following the certificate of the judge to the case made, it is no part of the case made and is not an amendment to it, the judge having certified that the record preceding his certificate is the case made which he signs and settles as such. The certificate of the clerk afterwards added does not refer to the evidence, but is a certificate to the correctness of the copies of the files which are on file in his office. Such certificate could serve no purpose connected with the case, unless possibly at some stage of the proceedings the record as made up might be used as a transcript, instead of a case made, in which case the certificate of the clerk, and not the certificate of the trial judge, would be of value.

The second and third grounds of the objection will be considered together. They allege that the case made does not show that it contains all the evidence before and considered by the lower court in the trial of the case. The case made contains this declaration:

"And at the trial of said action, the said cause was tried to the court without the intervention of a jury. The parties appearing, introduced their evidence, and certain orders and rulings were made at said trial, and certain objections made, and exceptions saved. All of said evidence so introduced at said trial in said action, and the objections made and exceptions saved, and the orders and ruling of the court, are in words and figures as follows, to wit:"

It will be observed that the language used is that the record contains all of the evidence offered upon the trial. We are cited by counsel to a number of authorities which are offered as sustaining this objection. An examination of them shows that the word "test-

mony" was used instead of evidence. There is a broad distinction between the two words. The word "testimony" means statement by witnesses under oath, while the word evidence, in its legal acceptance, includes all the means by which any alleged matter of fact under investigation is established or disproved. Testimony is not synonymous with evidence, as the word evidence, when addressed to a particular cause, covers all the testimony, records, documents, papers, and proofs submitted for the consideration of a court or jury; and where, as in this case, the record shows that all the evidence introduced at a trial is contained in the case made, in the absence of some showing to the contrary it must be held to be all the evidence produced to or considered by the court below.

278 The fourth ground of the motion is that summons in error was not issued within one year from the date of the judgment, to wit: March 16, 1903, and in this connection counsel for the defendants Grigsby and Grigsby move a dismissal of the case because no case made was presented within three days after judgment was rendered, nor was an extension of time granted within three days; that the term of court was allowed to adjourn without time being granted within which to present and settle a case made, and if it be considered that time was allowed, the same was not prepared and settled within the time so allowed.

The judgment was entered on the 16th day of March, 1903, and summons in error was issued March 16, 1904. The record in this case shows that a motion for a new trial was made and filed March 17, 1903, was considered and overruled on April 4, 1903, at which time the appellants excepted to the order overruling the motion, and were allowed sixty days in which to make and serve a case made, and thereafter from time to time up to and including December 22, 1903, for good cause shown, the time was extended 60 days. On the 12th day of October, 1903, however, counsel for defendant in error Ward, acknowledged service of the case made, and on October 15, 1903, counsel for defendants Grigsby and Grigsby, partners, also acknowledged service of the case made on behalf of G. M. D. and D. J. Grigsby, comprising the firm of Grigsby Bros., and each of them. On March 14 the case made was presented to the trial judge for settlement, after due notice to Ward and the Grigsbys, and was settled and signed on March 15, 1904.

As to each of the objecting defendants Ward and Grigsbys, the case as shown by the foregoing record was served within the time allowed by the orders of the court extending the time. On the 12th day of September, 1903, the defendants in error, Blitzer, McNeal, Griswold and De Bois, in writing, waived service upon them of the case made, and notice of signing and settlement of the same, also of the service of the summons in error. October 14, 1903, the American Exchange Bank of St. Louis waived service of case made upon it, which provided that such waiver should not constitute an entry of appearance, and afterwards on the 18th of February, 1904, said bank by its president acknowledged service of the case made. October 16, 1903, Benjamin Whitaker waived service of case made, and notice of the time of settling same. March 5, 1904,

the American Exchange Bank waived notice of the time and place of settling and filing the case made.

Under this status of the record we are unable to understand the contention of counsel. The language used with reference to the settling and signing of the case made would seem to indicate that they understood the extension of time granted was an extension of time within which to have the case made settled and signed by the court.

It is argued by counsel for defendants Grigsby that the last extension December 22, 1903, of sixty days, expired February 21, 1904, and case made was not settled until March 14 following, which was too late, as extension of time expired February 21. The law of proceeding in error by case made is manifestly misunderstood by counsel. The extension of time to make and serve a case made is not an extension of time within which the same may be settled and signed by the Court. The case made must be made within three days of the rendition of judgment and served upon the opposing party, unless for good cause such time is extended by order of the Court or Judge. After service of the case made the same may be settled and signed by the court or judge when presented by either party upon notice to the other within one year of the date of rendition of judgment.

The objection therefore that the case was not settled within the time allowed by the court is without foundation.

The objection that no case made was presented within three days, and no extension of time granted within three days, and that the court adjourned without time being granted, presents no substantial ground for the motion to dismiss the appeal. Under the practice in this Territory, the objections and exceptions taken and allowed upon the trial to the proceedings there had, and which are relied
279 upon as error, are preserved by a motion for a new trial, which may be filed within three days after the rendition of judgment, or the return of a verdict, and until after this motion for a new trial is heard and passed upon by the court, there is no reason or grounds for the making and service of a case made. The action is pending in the trial court upon the motion for a new trial and may be disposed of upon the application of either party. The verdict or judgment, if one had been entered in the case, does not become final in the court below until such motion for a new trial has been heard and determined, and upon which hearing, if exceptions are taken to the rulings of the court upon the motion for a new trial, the court may then for good cause extend the time within which the case made may be prepared and served by the party objecting upon the adverse party.

The grounds of the motion that summons in error was not issued within one year from the rendition of judgment, cannot be sustained even though it be granted that such case made must be settled and summons issued thereon within one year of the date of the rendition of judgment. The record shows judgment to have been entered March 16, 1903, and the case made to have been filed in the Supreme Court and summons was issued thereon as conceded on the 16th day

of March, 1904. Sec. 4918, Wil. Ann. Stat., provides: "The time within which an act is to be done shall be computed by excluding the first day, and including the last; if the last day be Sunday, it shall be excluded."

This statute was borrowed by this territory from the state of Kansas, where it had been passed upon and construed many times prior to its adoption here. The precise point under consideration here was considered by the Supreme Court of Kansas in Board of County Commissioners of Smith County *v.* Labor, *et al.*, 15 Pac. 577. The court in that case say:

"A proceeding in error, commenced in the Supreme Court on the same day of the same month of the next year after an order or judgment sought to be reversed, is made or rendered, is commenced within one year, and in proper time."

This objection cannot therefore be sustained.

The fifth ground of the motion to dismiss is that the case made was not served upon a number of necessary parties naming S. E. Pentecost, trustee, his alleged representatives Dungan, Bannister & Elder, the Southern Pine Lumber Co. a partnership, or Grigsby Bros., partnership.

It is not shown in what manner S. E. Pentecost was interested in the proceedings in error by which this case was brought to this court. He was neither judgment creditor or debtor, and had no personal estate in the property involved, was dead when the case was tried in the court below, and the case was tried without being revived as to him; his *cestui que trust* had parted with its interest in the property involved by an assignment thereof to the defendant in error, Ward. His legal representatives were not in any wise affected or interested. The judgment in the court below did not, and an affirmation or modification of that judgment could not affect his estate, nor could his legal representatives be held under the circumstances to be charged with any duty that he was charged with as trustee. We therefore hold that he was not a necessary party to the proceeding here sought to be reviewed. The case of Jilmert *v.* Conde, 39 Kansas, 265, is not in point. In that case the judgment creditor died and his representatives were necessary parties.

As to the partnership Southern Pine Lumber Co., and Grigsby Bros. the record shows service of case made on the two Grigsbys as partners, and each of them, and this record further shows that these persons were the partners composing the firm of Grigsby Bros. We are unable to understand what counsel meant by such an objection. A partnership is an inanimate thing and is brought into court by service upon the individuals composing the firm, and when so served the individuals and the partnership are in court for all
280 purposes of the case. The partnership Southern Pine Lumber Co. was composed of T. L. L. Temple and Benjamin Whitaker as shown by the record. Mr. Whitaker, October 16, 1903, waived service of case made upon him, and notice of time and place of settling and signing the same. His partner, T. L. L. Temple, is one of the plaintiffs in error, and in fact the principal mover in that behalf, and is therefore in court for all the purposes of this case.

The sixth ground of the motion has less reason for its support than the fifth. It is based upon the alleged fact that the American Exchange Bank of St. Louis and G. M. D. and D. J. Grigsby as individuals are not by the petition in error made parties to this proceeding in error, and are necessary to its determination. This ground of the motion cannot be sustained. By the language of the petition in error G. M. D. Grigsby and D. J. Grigsby are made parties defendant. There is no allegation which makes the partnership firm of Grigsby Bros. a party defendant; but the petition reads, "G. M. D. Grigsby and D. J. Grigsby partners as Grigsby Bros." The words "partners as Grigsby Bros." must be held to be words descriptive merely of G. M. D. Grigsby and D. J. Grigsby; and these persons having been summoned entered a general appearance in this court as to this procedure in error, this court having acquired thereby jurisdiction to determine their respective rights by virtue of the proceedings had in the court below. With reference to the American Exchange Bank of St. Louis it appears from an examination of the record that the action was one to foreclose a trust deed in favor of defendant in error Ward, and against the defendants named whose interest it is alleged was inferior to the rights of Ward under the trust deed. In this action the American Exchange Bank was not made a party defendant. Grigsby and Grigsby were made parties defendant, and they answered confessing the right of action of the plaintiff Ward, and claiming the equities in the property in question after the demands of Ward had been satisfied. In their cross petition they ask to have the American Exchange Bank made a party, but procured no order of the court making it a party. The American Exchange Bank however was summoned by publication, but made default. The president of the American Exchange Bank appeared as a witness on the trial of the cause, as did also the attorneys for said bank, without making a showing or claiming that any interest of the bank was involved in the suit; and later upon appeal to this court waived service of case made, and later still, after a copy of case made had been served upon it, waived notice of the time and place of settling the case made, and has failed to appear to any of the proceedings had in this court. The court upon examination of the record is unable to determine that the presence of the bank is necessary to a complete determination of the issues in this case, or that it has any interest affected by the judgment of the court below, or that may be affected by the affirmation, reversal or modification of the judgment, and is therefore of the opinion that the American Exchange Bank is not a necessary party to this proceeding.

The seventh ground of the motion is that no exceptions were taken or saved to the rendition of the judgment in the court below. The allegations of the motion for a new trial filed in due time are sufficient in this case to bring before the court the questions of error contended for, and which if found sufficient will justify this court in making such order with reference to such final judgment as may be necessary to correct the same. We find however upon examination of the record that the final judgment at the time of its rendition was

objected to by the defendant Southern Pine Lumber Co., T. L. L. Temple and Chinn and Chinn, plaintiffs in error.

The 8th and 10th grounds of objection are in substance that the judgment in the court below having — rendered on the 16th day of March, 1903, and the motion for a new trial determined April 4, 1903, at which time upon overruling said motion sixty days' time was allowed by the court in which to make and serve a case for the Supreme Court, that said sixty days' time began to run from the date of rendition of the judgment, and a second extension of time June 1, 1903, was out of time, because more than sixty days from the
281 date of judgment. The subject matter of this objection was partially considered in the determination of the fourth ground of the motion, *supra*, where we determined that upon the filing of a motion for a new trial within three days of the date of the rendition of judgment, the case was thereafter pending in the lower court, and further proceedings stayed until the motion for new trial was heard and determined. The record shows that the motion for a new trial was entered March 17, 1903, the next day after judgment, and was determined April 4th following, at which time 60 days was allowed in which to make and serve a case made. This 60 days did not relate back to or commence to run on the date of the rendition of the judgment, but did commence to run April 5th, under the rule of the statute excluding the first day in computation of time. The error then complained of was the overruling the motion for a new trial, and exceptions being taken, there was preserved thereby any error that may be found to have been made in overruling such motion, and in this manner the entire case is brought to this court for review upon all questions of error presented in the motion for a new trial; and if upon consideration it is found that the motion for a new trial is erroneously overruled, because of error of record properly presented by such motion, the judgment of the court below, which was stayed by the motion, will be modified accordingly. It is not error, therefore, to allow sixty days' time from the date of overruling the motion for new trial in which to make and serve case made, which may be extended from time to time for good cause by the trial court, if each extension is allowed prior to the expiration of the last preceding one.

The ninth and last ground for consideration is upon the ground that the case made does not contain all of the evidence which was before the lower court, and there considered upon the trial. Counsel says: "All of the records of the lower court in case No. 1521 was a matter of fact produced to the lower court and examined and read by it, but the stenographer did not get the offer in the record." This is an assumption by counsel, as the record shows that all the evidence is in the record, and if this fact of record is not correct it should have been corrected by counsel for defendant in error, when the case made was settled and signed. Such a question cannot be raised for the first time in this court by an allegation of this kind, and will never be considered unless the court can determine from the record that evidence before the lower court has not been preserved in the record and brought to this court.

Having considered each of the grounds of the motion of the defendants in error to dismiss the proceedings in error, and being unable to concur in each or any of the grounds of said motion, the same is hereby overruled and denied.

From the statement of facts in this case showing the issues as framed by the pleadings, it will be seen that the plaintiff sues to foreclose a trust deed, making numerous parties defendant who are charged with claiming some interest in the property, but which are inferior to the plaintiff's right under his trust deed sought to be foreclosed.

The plaintiffs in error answering the petition allege that their title is not inferior, that they are the owners of the property, holding under a title derived by purchase at a sheriff's sale of the same, pursuant to a judgment ordering and directing the sale of the same in a case No. 1524 in the District Court of Logan County, Oklahoma, being the case of the American Exchange Bank of St. Louis *v.* T. L. L. Temple, *et al.*, defendants; that in said sale all of the right, title and interest of G. M. D. and D. J. Grigsby was foreclosed and disposed of, they at the time being the owners thereof. G. M. D. and D. J. Grigsby, defendants, answer plaintiff's petition admitting their indebtedness to plaintiff Ward, and the existence and validity of the trust deed by the plaintiff sought to be foreclosed, and aver that they are the owners of the equity in the property covered by the trust deed sought to be foreclosed, after their debt to the plaintiff has been satisfied.

282 By way of answer and cross petition to the allegations of the answer of T. L. L. Temple, *et al.*, they say that no interest, right or title in the property was by him or his codefendants acquired under and by virtue of the sheriff's sale had pursuant to judgment in cause No. 1524 aforesaid; that said judgment and all proceedings thereunder in cause No. 1524 were void; that said judgment was entered by the court without jurisdiction of the parties.

From the foregoing brief statement of the issue it is apparent that if the plaintiffs in error acquired no title to the property by the proceedings had in case No. 1524, Logan County, O. T. that being their only source of title, the judgment of the court below foreclosing the trust deed sued upon, is correct. Upon the trial of the cause the trial court, after hearing the evidence, found the judgment and proceedings in cause 1524 to be void for want of jurisdiction in the court of the subject-matter, or of the parties, and entered judgment vacating and setting the same aside, and all proceedings had thereunder, and quieting the title to the property involved herein in G. M. D. and D. J. Grigsby, which was by the further decree of the court ordered sold to satisfy the indebtedness of said Grigsbys to the defendant in error, Ward, in the sum of $5797.00. It is urged by the plaintiff in error that this finding and judgment was erroneous for want of authority to hear and determine in this action the question of the validity of the judgment in 1524 and proceedings thereunder.

It will be observed that the plaintiff in error and G. M. D. and D.

J. Grigsby were brought into court in this case for the purpose of foreclosing their title to the property in question.

The Grigsbys were charged as being debtors to Ward, which indebtedness was secured by the trust deed sought to be foreclosed. The plaintiffs in error answering claimed that the indebtedness to the plaintiff was a pretense without foundation in fact, that it had once existed, but had been paid in full, which payment had liquidated any right of action to foreclose the trust deed, and that thereafter by reason of the judgment in 1524 and sale of the property pursuant thereto, they, the plaintiffs in error, were the owners in fee of the property. This issue presented by the plaintiffs in error the Grigsbys assailed in their cross petition, charging that the plaintiff in error acquired no title under and by virtue of the judgment and proceedings in case No. 1524, it being void as we have heretofore stated for want of jurisdiction of the parties to it, both plaintiff and defendant, and ask to have such judgment vacated and held for naught. This we hold was not a collateral attack, and cannot be held to be such. It was a direct attack, and intended as such upon the validity of that judgment, and might be made in this action under the circumstances of this case. A multiplicity of suits is discouraged by the law, and where, as in this case, the rights of the parties depend upon the validity or invalidity of some other judgment of the court, which is charged to be void for want of jurisdiction of the subject matter of the parties, and the necessary parties are before the court to enable it to determine the validity or invalidity of such other judgment for such cause, such determination may be had where it is necessary to a conclusion of the rights of the parties to the litigation.

In this case the plaintiff in error brought forward the judgment and proceedings thereunder in 1524 as the basis of their right to resist the foreclosure of the trust deed executed by the defendants Grigsby, who in turn say that such judgment was void for want of jurisdiction of both the parties and the subject matter, and set forth the reason why their allegation is true.

The court heard the evidence, and found the issues thus framed in favor of the allegation of want of jurisdiction in the court rendering judgment in case No. 1524, and entered its decree holding such judgment void. In this we see no error, nor any legal ground of complaint on the part of the plaintiff in error. It would be otherwise if it had been alleged that the judgment was voidable merely, 283 for in such case the court would have been called upon to act in an appellate capacity, and this we understand to have been the decision of the supreme court of the United States in Elliott v. Pearsall, 1st Peters, 26 U. S., 249, where the court says:

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgment and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a

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reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers. This distinction runs through all the cases on the subject; and it proves that the jurisdiction of any court exercising authority over a subject, may be inquired into in every court, when the proceedings of the former are relied on and brought before the latter, by the party claiming the benefit of such proceedings."

This determination was reviewed and confirmed by the Supreme Court in 44 U. S., 750. And in 49 U. S., 541, the court say:

"The principle that a record cannot be impeached by pleadings is not applicable where there is a want of jurisdiction. The want of it makes a record utterly void and unavailable for any purpose. The want of jurisdiction is a matter that may always be set up against a judgment when it is to be enforced, or when any benefit is claimed under it."

Here a benefit was claimed by the defendants Temple, *et al.*, under the judgment in case No. 1524, which was disputed by the defendants and cross petitioners, the Grigsbys, and it thus becomes apparent that under the law as above expressed by the Supreme Court of the United States, the judgment and proceedings in case No. 1524 was before the trial court in such way as to authorize that court to pass upon its validity. This the trial court did, and determined the judgment and all proceedings thereunder to be utterly void for want of jurisdiction over the parties plaintiff or defendant, or of the subject-matter of the action. This judgment in No. 1524 being thus open to the court's inspection in this case, the first inquiry of the court was necessarily directed to the proceedings by which it was claimed that court had obtained jurisdiction over the parties litigant and the subject of the action.

To a complete understanding of case No. 1524 let it be remembered that the American Exchange Bank of St. Louis had brought suit in Dallas, Texas, against the Union Mills Lumber Co., a partnership composed of the Grigsbys and Temple, and the Southern Pine Lumber Co., a partnership composed of T. L. L. Temple and Ben Whitaker, and T. L. L. Temple personally, in which action the said Bank plaintiff recovered judgment against the defendants named, and upon which judgment execution was issued, and which execution was satisfied in the hands of the sheriff by payment thereof by T. L. L. Temple. Thereafter suit No. 1524 was brought in the District Court of Logan County, Oklahoma, in the name of the American Exchange Bank upon the Dallas judgment, and against the defendants, T. L. L. Temple and Ben Whitaker, partners of the Southern Pine Lumber Co., the Southern Pine Lumber Co., a corporation of Arkansas, D. J. Grigsby, G. M. D. Grigsby, and T. L. L. Temple, partners, under the firm name of Union Lumber Mills Co., to recover in that court upon the Dallas judgment as a first cause of action; and a second cause of action therein stated upon an account alleged to have been owing by the Union Lumber Mills Co. to the Southern Pine Lumber Co., and by said company assigned to the Southern Pine Lumber Company, a corporation, and by said corpora-

tion assigned to the plaintiff. An attachment was issued in said cause out of the District Court of Logan County, O. T., and levied upon the property now in question in this suit.

284 Service of summons by publication was had upon the defendants named, and upon default by them judgment was entered for the amount sued for, and the attached property ordered sold, plaintiffs in error becoming the owners under and by virtue of a sale had pursuant to such order.

The title of plaintiffs in error to the property in controversy by reason of such judgment and sale, is the bone of contention in this suit. The trial court held the judgment and all proceedings thereunder void, and this holding we think must be affirmed.

While it is true that the American Exchange Bank of St. Louis, plaintiff in cause No. 1524, was not made a party to this case, it is also true, we think, that said bank never was a party to the proceedings had in said cause No. 1524. Its president was a witness in this case, and testified that he did not know anything about the case, No. 1524, that McCormick & Spence, attorneys at Dallas, Texas, were the bank's attorneys, and the only people who had authority to bring that action, or any action in that behalf; that he as president of the bank did not know of the suit until he was written to about it by Mr. Prendergast, attorney for the defendants in error; that he knew nothing about the $294.00 account sued on in that action, and that he would have known of it if the same had ever been transferred to the bank. And the record further shows that McCormick & Spence knew nothing of the bringing of the action, and did not authorize it to be brought.

By the testimony of the plaintiff in error T. L. L. Temple, it appears that he caused the action No. 1524 to be brought without consultation with the American Exchange Bank.

The record further shows that the Dallas judgment was collected upon execution in February, 1892, from T. L. L. Temple, and the amount so collected was by the sheriff paid to McCormick & Spence, attorneys for the American Exchange Bank. This testimony is undisputed upon the record and justifies the finding of the court below, that said action No. 1524 was never brought or authorized by the American Exchange Bank, the plaintiff named therein. It had in fact no cause of action. The Dallas, Texas, judgment having been paid on execution, the same was thereby liquidated, and could not rightfully be made the basis of another action, by the bank of any one in its behalf; and it could not become the owner of the $294 account sued on except by some agreement or undertaking whereby it became entitled to maintain an action thereon.

It therefore appears from the record that the District Court of Logan County did not at the time of the rendition of the judgment in said cause have jurisdiction of the plaintiff in that action, of the subject-matter, or to render any judgment in that case in the plaintiff's name.

Jurisdiction of the parties and of the subject matter is essential to the rendition of a valid judgment, and without it a judgment is void, and no right can be acquired thereunder. It is equally as es-

sential that the court should have jurisdiction of the plaintiff as of the defendant. Such jurisdiction is ordinarily acquired by the plaintiff coming voluntarily into court and by appropriate pleadings invoking the exercise of the court's jurisdiction, thereby submitting himself and his cause of action to the ultimate determination of the court.

If it is shown that this is not done or authorized to be done, the court acquires no jurisdiction of the subject-matter, and if as in this case the action is instigated and directed by a person not authorized, it is immaterial what the motive may have been, it is fraud upon the court as well as the parties, and all transactions thereunder are void *ab initio*.

Fraud of such character vitiates and avoids all rights attempted to be acquired thereby; and if a record, void for such reason, is brought forward and relied upon by a party to pending litigation, and its validity is challenged as in this case, and a determination of its validity or invalidity is necessary to complete determination of the pending cause, such validity or invalidity may be determined. It is immaterial whether or not the parties plaintiff to the challenged record are brought in; he is sufficiently represented by the
285 party claiming under him who pleads or relies upon the right acquired thereunder and thereby, for in such case there was no party plaintiff,—the whole proceeding was fictitious and void, and when clearly and satisfactorily shown should be so declared.

The trial court in considering the validity of the judgment in No. 1524 found the services by publication void for want of sufficient allegations in the affidavit therefor; and the order of attachment also void for want of a sufficient affidavit to warrant the issuance of the same.

We find it unnecessary to determine these questions; having already determined that the judgment in said cause No. 1524 and all proceedings thereunder were void for want of jurisdiction in the court rendering the same, such conclusions determined the rights of the plaintiff in error in this case adversely to them. With the rights of the plaintiff in error eliminated from this case, for the reason hereinbefore stated, the cause stands as an action by the defendant in error, Ward, for foreclosure of a trust deed against the defendants Grigsby. The lower court found the legal title to the property in question to be in the defendants G. M. D. and D. J. Grigsby, who executed the trust deed sued upon, and quieted the title in them subject to the rights of the plaintiff under such trust deed, and entered judgment foreclosing the same, which judgment we think was correct, and must be affirmed.

Judgment affirmed, all the justices concurring, except Burford, C. J., who presided in the court below.

286 And afterwards, on the 26th day of September, 1905, there was filed in said cause a Petition for Rehearing, and afterward, on the 2nd day of November, 1905, there was filed in said cause a Reply to said Petition for Rehearing, which Petition for Re-

hearing and Reply thereto read in words and figures as follows, to wit:

287 Filed Sep. 26, 1905. Benj. F. Hegler, Clerk Supreme Court. By ——— ———, Deputy.

In the Supreme Court of the Territory of Oklahoma.

No. 1483.

SOUTHERN PINE LUMBER CO. ET AL., Plaintiffs in Error,
vs.
W. B. WARD ET AL., Defendants in Error.

Petition for Rehearing.

Comes now the plaintiffs in error and each of them, and make and present this their petition for a rehearing and reconsideration in and of the said cause, and pray that such rehearing may be granted and that the decision and judgment herein be set aside and vacated for and upon the grounds hereinafter set forth.

Preliminary Statement.

In this case the plaintiff Ward sued to foreclose a trust deed as a mortgage and made the Grigsbys and Southern Pine Lumber Company, and others, defendants. A contest arose between the said defendants over the title to the real estate involved, and in trying out this title, a judgment in a former case, No. 1524, was brought into question, the Grigsbys claiming as original owners and the said others defendants as purchasers at an attachment sale in said former action No. 1524. The trial court held that the proceedings in the said former case were directly attacked in this case at bar, and this court has continued that judgment. The attack on the former judgment and proceedings was that the plaintiff therein did not authorize that suit and that therefore court in that former case had no jurisdiction or authority to render the judgment or order the attachment sale, and for such reason in the case at bar held that the judgment and proceedings in No. 1524 could be assailed and held void.

Grounds for Rehearing.

1. The court erred in holding that in the case at bar the attack on the judgment was direct and not collateral.

Black on Judgments, (Sec. 252.)
Van Fleet on Collateral Attack, (Secs. 2 and 3.)

2. The court erred in not holding that in any event the attack on the former judgment and proceedings was insufficient to question

the same upon the ground that the plaintiff, namely: American Exchange Bank, in that former suit, was not properly a party to this case at bar and, hence, that there was no jurisdiction in this case at bar to question the former judgment and proceedings.

Black on Judgments, (Secs. 301, 302.)
Harwood *vs.* Railroad, (17 Wall. 78.)
Haggerty *vs.* Phillips, (21 La. Ann. 729.)
See Argument, ground 4 of original brief.)

3. The court erred in not holding that the claim of the plaintiff of a debt and demand against the Grigsbys had been satisfied
288 and paid and that, therefore, the plaintiff below, W. B. Ward, had no standing or right to recover, all of which is shown by the undisputed evidence in the record.

(See Argument and Authority, Subdivision No. 1 of original brief.)

4. The court erred in overlooking and failing to pass upon the ground set forth in the appellant's brief to the effect that the Grigsbys in their attack on the former judgment proved no title of their own to the real estate involved, for which reason they were not entitled to attack the former judgment, and had no interest at stake as a basis therefor.

(See Subdivision No. 6 Original Brief.)

5. The court erred in failing to consider or pass upon the proposition that the contest in this action over the real estate involved was not maintainable and should have been decided against the Grigsbys and Ward, for the reason that the owner of the legal title has never been made a party defendant in this action, and that the action in that regard was brought against Southern Pine Lumber Company, an Arkansas corporation, instead of the Southern Pine Lumber Company, a Texas corporation, the evidence showing that the latter is the owner of the legal title to the premises.

(See Subdivision 5, Original Brief.)

6. The court erred in ruling and holding to the effect that the former judgment in case 1524 is void for want of jurisdiction over the plaintiff on the ground that such plaintiff did not authorize said action, and that in said former action there was no jurisdiction as to said plaintiff, and therefore, no jurisdiction as to the action itself. The sole ground on which the court is held not to have had jurisdiction in the former action was that the plaintiff therein did not authorize that action. This error consists, First, in this, that there was not sufficient proof of lack of authority from said former plaintiff to bring said action, and, Second, that was a matter of defense for the defendant and not to be collaterally raised, and, Third, in a case of that kind where a former judgment is assailed because of lack of jurisdiction over one of the parties the objection to a contest against the former judgment must be raised directly in the same suit. And this Honorable Court has overlooked its own holding and ruling on this exact question found in the case of Hockaday *vs.* Jones, (8

Ok. 56 Pac. 1054), which we insist is a controlling authority and decision upon the subject. In the case of Hockaday *vs.* Jones, it was expressly held that a suit to join and dispose of a former judgment for want of jurisdiction over the defendant on the part of the court rendering that former judgment, could not be maintained, and that is the precise point involved in the attack upon the former judgment in this case.

Respectfully submitted,

COTTERAL & HORNOR,
Attorneys for Plaintiffs in Error.

289 In the Supreme Court of the Territory of Oklahoma.

Cause No. 1483.

SOUTHERN PINE LUMBER CO. ET AL., Plaintiffs in Error,
vs.
W. B. WARD ET AL., Defendants in Error.

Reply to Petition for Rehearing and Brief in Support Thereof.

J. D. Cook, Harper S. Cunningham, Cotteral & Hornor, Attorneys for Plaintiffs in Error.
F. H. Prendergast, Attorney for Grigsbys, Defendants in Error.
Buckner & Son, Attorneys for W. B. Ward, Defendants in Error.

Filed Nov. 2, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court.
By ——— ———, *Deputy.*

290 In the Supreme Court of the Territory of Oklahoma.

Cause No. 1483.

SOUTHERN PINE LUMBER CO. ET AL., Plaintiffs in Error,
vs.
W. B. WARD ET AL., Defendants in Error.

Reply to Petition for Rehearing and Brief in Support Thereof.

The petition for a rehearing in this case does not present any new question for the Court, and therefore does not come within the rule of this Court allowing such petitions to be filed, in this to-wit:

Rule 19 of Practice, says that the petition must show, "either that some question decisive of the case and duly submitted by counsel has been overlooked by the Court, or that the decision is in conflict with an express statute, or controlling decision, to which the attention of the Court was not called, either in the brief or oral argument, or which has been overlooked by the Court, and the QUESTION STATUTE, or DECISION so overlooked must be distinctly and particularly set forth in the petition."

1.

Counsel's first ground for review is, that the Court erred in not holding that the several attacks on the judgment, which plaintiffs in error, pleaded and relied upon as giving them title to the property in contr-versey was not a collateral attack; and as such could not be sustained. This question was fully considered and passed upon by the Court. Besides in this jurisdiction this argument is only applicable to avoidable judgments, made so by statutory enactment.

The judgment attacked in this case is a void judgment, and this counsel for plaintiff in error at least impliedly admit as they make no issue on the primary question. A judgment may even be attacked collaterally whenever it is pleaded and relied upon by a person as entitling him to affirmative relief against parties interested who were not made parties to the judgment, as was done in this case; see the plea of plaintiffs in error to quiet title to the property
291 as against the defendants in error, after this pleading was filed it was answered by the Grigsbys; and upon the issue made by plaintiffs in error themselves, they now seek to escape. Mr. Ward also directly attacked the judgment, this he had a right to do to the same extent that he could question any other outstanding liens or titles affecting the property, which would conflict with his deed of trust, indeed it was his duty to bring in all outstanding claimants and have their titles or claims adjusted.

Freeman on Judgments 2nd. Ed. Sec. 336.

"Whenever a judgement or decree is procured through the fraud of either of the parties, or by collusion of both, for the purpose of defrauding some third person, he may escape from the injury thus attempted by showing in a collateral proceeding, the fraud or collusion by which the judgment or decision was obtained."

2.

The second ground is merely a partial restatement of the former argument made by them which has been fully considered and passed upon in this case; and the question urged is one of defective parties; raised for the first time in this Court, which will not be permitted.

U. S. *vs.* Agee, 108 Fed. R. 10.
Belt *vs.* Todd 51 Mich. 21.
Moore *vs.* Association 45 S. W. 974.
Ehret *vs.* R. R. Co. 151 (24 Atl. 1068).
Renseick *vs.* Cook 110 Mo. 183.
Pavist *vs.* Foster 30 N. W. 697.

Besides this Court has found from an examination of the case, even if the proceedings by which the American Exchange Bank was made a party were technically defective, that said bank has repeatedly appeared in said case in both the lower and Supreme Court.

Again there is nothing in the record to show that it was not properly made a party, but the record does show, page 169, "the Court further finds that the defendants the American Exchange

Bank of St. Louis, Mo., a corporation * * * have been duly and legally served by publication service as provided by the laws of the Territory of Oklahoma."

And said Bank claims no interest in the proceedings, and the plaintiffs in error themselves testify that they used the bank's name as plaintiff without its knowledge or consent, and further they plead and swear that they are the real parties in interest, this being true the Bank being a ficticious party, not interested, the Bank itself could not complain; and the plaintiffs in error certainly manifest the greatest impertinence by seeking to predicate error on the
292 foundation of their own fraud, and this in face of their direct admissions of guilt.

The Court gave this question thorough consideration.

3.

The third ground for review raises a question of the sufficiency of the evidence to sutain the judgement below, which this Court does not review.

Smith *vs.* Spencer 8 Ok. 459.
McKennon *vs.* Pentecost 8 Ok. 117.
Waltrie *vs.* Carriger 5 Kan. 672.
Nicholson *vs.* Holman 17 Kan. 22.
Evans *vs.* Layfath 29 Kan. 736.

Besides this Court fully considered said question and found the evidence sufficient to sustain the judgment of the lower Court.

4.

The fourth ground raises another question of the sufficiency of the evidence, which the Court passed upon and held sufficient; they say the Grigsbys did not prove title, but the testimony shows that they did, but to lay at rest the question it would only be necessary to examine the pleadings where they allege under oath, that the Grigsbys owned the property, and they sold it under the void judgment so as to dispose of the interests of the Grigsbys in the property, there is also an admission in the record by all parties as to the ownership of the property, the source of the title being the Union Lumber Mills Co.

5.

Their fifth ground again r-ises the question of defective parties, for the first time in this Court, which can not be done, see citations under reply to second grounds.

They say that the Southern Pine Lumber Co., a Texas corporation, should have been made a party, even if this were true it would not effect these plaintiffs in error, for it would not be prejudicial error as to them, but in face of their claim, the Arkansas corporation together with the other plaintiffs in error answered and said that they owned the property in controversy, and asked that their title be quieted, we certainly caught the right parties.

6.

The sixth ground is a substantial rehearsal of their former argument, and this Court considered the same fully in its decision; they say first that fraud and want of parties to a suit does not deprive the Court of jurisdiction; it is elementary that the Court must acquire jurrisdiction of the parties and the subject matter before it can pronounce a judgment condemning either, we do not consider the question open to discussion. "Fraud viciates and avoids any
293 transaction tainted by it, even the most solemn judgments of a Court of record." From Buchannan *vs.* Bilger 64 Tex. 590.

Plaintiffs in error further says in this connection that the court overlooked the case of Hockaday *vs.* Jones 8 Ok. 156, they say that because the Court held in that case that it would not grant an injunction, to enjoin a void judgment, that therefore a person can not take any other steps in opposition to a void judgment, even though the judgment be set up and pleaded as bar-ing a person from legal rights involved in *in* the void judgment: We have never been able to understand counsel's application of that case to this case—of course in that case the parties seeking an injunction had an adequate remedy at law, and it was for this reason alone that the injunction was denied in that case.

Counsel have raised no question which has not been fully considered in the opinion of this Court, they have cited no new authority, in fact their petition is simply a revision of their brief in a condensed form and shows no cause for a reconsideration of this case.

The defendant in error W. B. Ward in addition to the reasons given above why a rehearing should not be granted in this case says, that the Court did not pass upon several preliminary motions filed by the defendant in error, to-wit: A typewritten motion to dismiss the appeal as to W. B. Ward; this motion was filed June 1st, 1904; based upon the fact that no service of summons in error was ever made on him or his attorneys; the validity of this motion was confessed by plaintiffs in error, by them sueing out an alias summons after the motion was filed, which alias summons is error was issued long after the year in which to appeal had expired, and on June 6th, 1904, defendant in error W. B. Ward filed his motion to quash the alias summons in error because it was void, because issued after a year from rendition of judgment, and confer-ed no jurisdiction on the Court to disturb the judgment of the lower Court, and defendant in error cited the following cases in support of his motions.

Summons must be issued within one year.

Walton *vs.* Williams 5 Okla. 642.

"It is required that the appeal shall be taken and perfected (which includes the issue of summons in error) within one year from the rendition of the judgment appealed from."

Summons issued after year from rendition of judgment confers no jurrisdiction on the Supreme Court.

Republican Valley R. Co. *vs.* Sayer 13 Neb. 280. 9 13 N. W. 404.

Jurisdiction. Where an alias summons was issued and served after the expiration of a year from the rendition of the judgment, held it gave the Court no jurisdiction. See also to same effect:

294 & 295 Baker *vs.* Sloss 13 N. W. 212, and cases cited.
Bowen *vs.* Bowen 36 Ohio St. 312.
Wiley *vs.* Neal 37 N. W. 926.
Elliott's Appellate Pr. Secs. 144-173.

A motion pending to dismiss an appeal for want of service is confessed by plaintiff in error suing out an alias summons in error. ..
Segar *vs.* Muskegon S. & L. Co. 45 N. W. 982.

Wherefore defendants in error pray that said petition for a rehearing be denied and that said appeal as to W. B. Ward be dismissed.

Respectfully submitted,

BUCKNER & SON,
Attorneys for Defendant in Error, W. B. Ward.

296 And thereafter on the 27th day of October, 1905, there was filed in said cause an Application for Stay of Mandate, which Application reads in words and figures as follows:

297 In the Supreme Court of the Territory of Oklahoma.

SOUTHERN PINE LUMBER COMPANY ET AL., Plaintiffs in Error,
vs.
W. B. WARD ET AL., Defendants in Error.

Application for Stay.

Come now the plaintiffs in error, Southern Pine Lumber Company and T. L. L. Temple, and G. W. R. Chinn and Mrs. G. W. R. Chinn, and make application to the Honorable Frank E. Gillette, for an order fixing terms for a stay of the mandate and final orders in said action, pending the disposition of the Motion for Rehearing in the Supreme Court of the Territory, and for all other proper relief in connection therewith.

Respectfully submitted,

SOUTHERN PINE LUMBER COMPANY,
T. L. L. TEMPLE,
G. W. R. CHINN, AND
MRS. G. W. R. CHINN, *Plaintiffs in Error.*
By COTTERAL & HORNOR, *Their Attorneys.*

Endorsed: 1483—Southern Pine Lumber Co. *et al. v.* W. B. Ward *et al.*—Application for Stay of Mandate—Filed October 27, 1905, Benj. F. Hegler, Clerk Supreme Court.

298 And afterward, on the 27th day of October, 1905, there was filed in said cause an Order granting a stay of Mandate

in said cause, which Order reads in words and figures as follows, to wit:

299 In the Supreme Court of the Territory of Oklahoma.

No. 1483.

SOUTHERN PINE LUMBER COMPANY ET AL., Plaintiffs in Error,
vs.
W. B. WARD ET AL., Defendants in Error.

Order.

Now on this the 25th day of October, A. D. 1905, come the plaintiffs in error, Southern Pine Lumber Company, T. L. L. Temple, G. W. R. Chinn and Mrs. G. W. R. Chinn, and make application to me for an order fixing terms for a stay of the mandate and final orders therein pending the disposition of the petition for rehearing in said action, and due cause appearing, it is by me ordered that said mandate and final orders be stayed when said plaintiffs in error shall give a bond, signed by at least one surety, a resident of the Territory of Oklahoma, in the sum of One Thousand Dollars ($1000.00) unto the defendants in error herein, to the approval of the Clerk of said Court, conditioned that said plaintiffs in error will pay the said defendants in error all damages they may sustain by reason of said stay of mandate and orders if it be finally decided that said petition for rehearing should be and shall be overruled.

Done at Lawton, Oklahoma Territory, this 25th day of October, A. D. 1905.

F. E. GILLETTE,
Justice of the Supreme Court.

Endorsed: Number 1483—In the Supreme Court of the Territory of Oklahoma—Southern Pine Lumber Company *et al.*, Plaintiffs in error, *vs.* W. B. Ward *et al.*, Defendants in error—Order—Filed October 27, 1905, Benj. F. Hegler, Clerk Supreme Court.

300 And afterward on the 6th day of November, 1905, there was filed in said cause a Stay Bond, which Bond reads in words and figures as follows, to wit:

301 In the Supreme Court of the Territory of Oklahoma.

Cause Number 1483.

SOUTHERN PINE LUMBER COMPANY ET AL., Plaintiffs in Error,
vs.
W. B. WARD ET AL., Defendants in Error.

Stay Bond.

Know all men by these presents, that the plaintiffs in error, Southern Pine Lumber Company, T. L. L. Temple, G. W. R. Chinn and Mrs. G. W. R. Chinn, as principals, and U. C. Guss, as

surety, are hereby held and firmly bound unto the said W. B. Ward and the other defendants in error, in said action, in the sum of One Thousand Dollars ($1000.00), for the payment of which they bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, and firmly by these presents.

Witness our signatures hereunto subscribed this the —— day of ——, A. D., 1905.

The conditions of the foregoing obligation are such however that if the said principals, the said plaintiffs in error, shall pay unto the said W. B. Ward and said other defendants in error in said action all damages which they may sustain if it shall be finally decided by said Court that the Petition for Rehearing of said plaintiffs in error should be and shall be denied, then this obligation shall be null and void; otherwise to be and remain in full force and effect.

SOUTHERN PINE LUMBER CO.,
T. L. L. TEMPLE, *Prest.*
T. L. L. TEMPLE.
U. C. GUSS.

Attest:
F. W. OFFENHAUSER,
[SEAL.] *Sec'y.*

302 TERRITORY OF OKLAHOMA, *Logan County, ss:*

U. C. Guss, of lawful age, being duly sworn upon oath, deposes and says that he is the above named surety, that he is a resident of said County and Territory, and that he is worth the sum of Two Thousand Dollars ($2000.00) over and above his debts, liabilities and exemptions.

U. C. GUSS.

Subscribed and sworn to before me this the 6th day of Nov., 1905.
[SEAL.] E. J. BLACKMAN,
Notary Public.

My Com. expires Dec. 27th, 1906.

Approved by me this 6th November, 1905.
BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

Endorsed: 1483—Southern Pine Lumber Company *vs.* W. B. Ward *et al.*—Stay Bond—Filed November 6, 1905, Benj. F. Hegler, Clerk Supreme Court.

303 And afterward, at the January, 1906, Term of said Supreme Court, on the Eleventh day of January, 1906, the following proceeding was had in said cause, to wit:

1483.

SOUTHERN PINE LUMBER COMPANY ET AL., Plaintiffs in Error.
vs.
W. B. WARD ET AL., Defendants in Error.

Ordered by the Court, that the petition for rehearing in this cause be and the same is hereby overruled. And exception allowed.

304 And on the 12th day of June, 1906, an application for certification by the Court of a statement of facts in the nature of a special verdict was made in this cause, which application reads in words and figures as follows, to wit:

305 In the Supreme Court of the United States.

THE SOUTHERN PINE LUMBER COMPANY, a Corporation, ET AL., Appellants,
vs.
W. B. WARD ET AL., Appellees.

Application for Certification by the Court of a Statement of Facts in the Nature of a Special Verdict.

Come now the appellants in the above entitled cause, and show to the Supreme Court of the Territory of Oklahoma, that on the 12th day of June, 1906, they filed their petition in the Supreme Court of the said Territory for an appeal of the said cause to the Supreme Court of the United States and presented the same to the Honorable John H. Burford, Chief Justice of said Supreme Court of Oklahoma Territory, and obtained an order for said appeal and for the issuance of citation and for a stay of proceedings therein, and for the certification of said cause by the Clerk of the Supreme Court of Oklahoma Territory to the Supreme Court of the United States, and that the said Clerk is preparing a transcript of the proceedings and judgment and decree in said cause to the Supreme Court of the United States, in accordance with the laws of said appeal.

Your appellants further show to the Court that the said cause was tried upon issues joined in the District Court of Logan County, Oklahoma Territory, from whence the appeal was taken to the Supreme Court of the Territory of Oklahoma, and upon said trial evidence was offered by both parties, but that no special findings of fact and no special verdict was made, other than appears from the journal entries in said trial court and in the opinion of said Supreme Court; that some of the questions raised in said cause, and which questions are material, will involve a consideration of the facts of said cause by the Supreme Court of the United States, and the appellants
306 believe and therefore say that they will, under the law and the practice of said Court, be unable to present the same unless a statement of the facts of the case in the nature of a special verdict and also the rulings of the Court on the Admission and rejection of

evidence excepted to shall be made and certified by this Court and transmitted to the Supreme Court of the United States, together with the transcript of the proceedings and judgment and decree appealed from; that *at* an opportunity should be given to the appellants to fully present their cause, and justice requires that such statement of facts in the nature of a special verdict be made and certified by this Court, and transmitted to the Supreme Court of the United States; that this application is not made for the purpose of delay, but in order that justice be done the appellants.

Wherefore, the appellants pray the Supreme Court of Oklahoma to make a statement of facts of this cause in the nature of a special verdict, and also the rulings of the Court on the admission and rejection of evidence excepted to, and certify the same and transmit the same with the transcript of the proceedings and judgment and decree appealed from to the Clerk of the Supreme Court of the United States, to be filed with and become a part of the records and proceedings in said cause.

J. D. COOK,
JNO. H. COTTERAL,
C. G. HORNOR,
Attorneys for Appellants.

TERRITORY OF OKLAHOMA, *Logan County, ss:*

John H. Cotteral, of lawful age, being first duly sworn, says that he is counsel and one of the attorneys for the plaintiffs in error and appellants, who were defendants in the trial court, that he has read and knows the facts stated in the above and foregoing ap-
307 plication and that the statements therein contained are true.

JOHN H. COTTERAL.

Subscribed and sworn to before me this June 12, 1906.
[SEAL.]
BENJ. F. HEGLER,
Clerk Supreme Court of Territory of Oklahoma.

Endorsed: 1483. Southern Pine Lumber Co. *vs.* W. B. Ward *et al.* Application for Statement of Facts. Filed June 12, 1906. Benj. F. Hegler, Clerk Supreme Court.

308 And on the same day, to wit, June 12, 1906, said application came on for hearing and determination by the Court, and was by the said Court denied in words and figures as follows, to wit:

#1483.

THE SOUTHERN PINE LUMBER COMPANY ET AL., Plaintiffs in Error,
vs.
W. B. WARD ET AL., Defendants in Error.

And now on this 12th day of June, 1906, this cause comes on for further hearing upon the Application of Plaintiffs in Error for a

Certificate by the Court of a Statement of Facts in the Nature of a Special Verdict herein.

And the Court having duly considered the same, and being fully advised in the premises, finds: That said application should be denied.

It is therefore ordered by the Court, that the application of plaintiffs in error for a certification by the Court of a statement of facts in the nature of a special verdict herein be and the same is hereby denied.

And exception is allowed.

309 In the Supreme Court of the Territory of Oklahoma.

UNITED STATES OF AMERICA, *Territory of Oklahoma, ss:*

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that the foregoing 308 pages, numbered from 1 to 308, inclusive, are a true and complete transcript of the record and all proceedings in said Supreme Court in the case of The Southern Pine Lumber Company, a corporation, *et al.*, Plaintiffs in error, *vs.* W. B. Ward, *et al.*, Defendants in error, as the same remain upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Guthrie, this 9 day of July, A. D. 1906.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Endorsed on cover: File No. 20,330. Oklahoma Territory Supreme Court. Term No. 365. The Southern Pine Lumber Company, T. L. L. Temple, G. W. R. Chinn *et al.*, plaintiffs in error and appellants, *vs.* W. B. Ward *et al.* Filed August 10, 1906. File No. 20,330.

Office Supreme Court, U. S.
FILED
NOV 8 1907
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 82.

THE SOUTHERN PINE LUMBER COMPANY, T. L. L. TEMPLE, G. W. R. CHINN ET AL., PLAINTIFFS IN ERROR AND APPELLANTS,

vs.

W. B. WARD ET AL., DEFENDANTS IN ERROR.

In Error and Appeal from the Supreme Court of the Territory of Oklahoma.

Brief for Appellants and Plaintiffs in Error.

ARTHUR A. BIRNEY,
HENRY F. WOODARD,
For Appellants and Plaintiffs in Error.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 82.

THE SOUTHERN PINE LUMBER COMPANY, T. L. L. TEMPLE, G. W. R. CHINN ET AL., PLAINTIFFS IN ERROR AND APPELLANTS,

vs.

W. B. WARD ET AL., DEFENDANTS IN ERROR.

In Error and Appeal from the Supreme Court of the Territory of Oklahoma.

Brief for Appellants and Plaintiffs in Error.

Statement of the Case.

The defendant in error, W. B. Ward, filed his petition in the District Court of Logan County, Territory of Oklahoma, on the 5th day of May, 1900, (Rec., 30), against F. E. Pentecost, trustee, for the use and benefit of the National Bank of Jefferson, Texas, the Southern Pine Lumber Company, an Arkansas corporation, T. L. L. Temple and Benjamin Whittaker, copartners, trading as the Southern Pine Lumber Company, G. M. D. Grigsby and D. J. Grigsby, copartners, trading as Grigsby Brothers, G. W. R. Chinn and his wife, and others, and against

all persons claiming title to any of the property described in said petition, under or through the Southern Pine Lumber Company or T. L. L. Temple.

Ward charges that on the 11th day of June, 1891, Grigsby Brothers made a note to their own order for five thousand dollars ($5,000), payable ninety days after date, with interest at one per cent per month, which they endorsed and delivered before maturity for value to the National Bank of Jefferson, Texas, and that, thereafter, on the 27th day of July, 1891, the said Grigsby Brothers executed and delivered to the defendant Pentecost a deed of trust of certain specified properties to secure the payment of the $5,000 note sold to the said bank (Rec., 31); that said deed of trust was duly recorded. Petitioner then avers that said note for $5,000 was sold and the trust assigned to the plaintiff on the —— day of ——, in the year 189–, by the National Bank of Jefferson; that the *sale of said note and the assignment of said trust to him was completed before the maturity of said note, and was made for a valuable consideration paid in good faith, and that he is now the legal owner of said note and deed of trust*, and that there is due him on the same $5,000 principal, $5,075 accrued interest, and $1,007.50 attorney's fees. That on the 11th of June, 1895, the note and trust were extended for ninety (90) days, but the same is now due and unpaid and plaintiff has demanded payment of the same. Petitioner then avers that request has been made of Pentecost, trustee, to sell the property described in said deed of trust and to prosecute this suit, but that said trustee refused so to do, and would not permit his name to be used as plaintiff herein. Petitioner tenders all legal charges and prays the court to compel the legal trustee to convey the property to the plaintiff. The petitioner then charges that all the defendants, save the Grigsbys, claim some interest in the property set out in

the trust deed, equal or superior to the title of the plaintiff. The plaintiff alleges that they are *mere trespassers upon the said property* and that they have no legal or equitable claim thereto. Plaintiff further avers that the said defendants claim some interest or estate in said properties, by reason of their being purchasers or holding under purchasers at an execution sale of said property under a judgment of the District Court of Logan County, Oklahoma; that the judgment under which that claim was entered was in the case of the American Exchange Bank, plaintiff, against Temple and Whittaker, trading as the Southern Pine Lumber Company, and the Southern Pine Lumber Company, an Arkansas corporation, and D. J. Grigsby, T. L. L. Temple, and G. M. D. Grigsby, co-partners, trading as the Union Mills Lumber Company. The complainant avers that the amended petition in said cause was filed in the District Court of Logan County, on the 17th day of December, 1894, and the judgment of that court bears date March 2, 1895; that neither the plaintiff, the National Bank of Jefferson, or Pentecost, as trustee, was a party to said suit, and that neither the plaintiffs nor defendants, nor either of them, in said last-mentioned suit, had any interest in the property sold to satisfy said judgment and included in the trust deed of the plaintiff; and that, at all times, plaintiff has held the legal title to said property included in said deed of trust. Plaintiff avers that all proceedings had in said cause are null and void and of no effect, for the reason that no service was ever had, made or procured in said cause against any of the defendants therein named, or against the trustee or cestui que trust aforesaid named, or against this plaintiff, the attempted service by publication being void.

The plaintiff then prays that defendants be required to answer as to their claims and interest in said property; that said deeds of conveyance to them be adjudged

null and void and be cancelled, and the title to said property be quieted in the plaintiff, and that he have judgment for $11,082.50; that the trust deed be foreclosed and the property sold to satisfy plaintiffs' judgment.

The defendants, the Southern Pine Lumber Company, Temple, and the two Chinns, for joint answer to plaintiffs' petition, admit the execution of the note for $5,000, delivery of the same to the National Bank of Jefferson, and the execution and delivery of the deed of trust to secure the same. They admit that Pentecost, trustee, accepted the said trust and that same has never been released.

They deny that the plaintiff is now, or ever was, the owner of the $5,000 note executed by the Grigsbys and delivered to the National Bank of Jefferson, and that the said note and the trust deed given to secure the same were ever sold and assigned by the said bank to the plaintiff, or that the plaintiff is now interested either legally or equitably in said note or deed of trust; and they deny that there is anything due and unpaid on the said note, either to the plaintiff or any other person.

The defendants then aver that the note sued upon by the plaintiff was paid by the Grigsbys to the receiver of the National Bank of Jefferson, under a compromise agreement between the said receiver and the Grigsbys, and for a sum less than the face value of the note, and that it was surrendered to the Grigsbys, and said deed of trust assigned to them in *blank* after said note secured by said trust deed had been paid and delivered to the Grigsbys.

The defendants admit that Chinn and wife hold, through Temple, an interest in a part of the property included in the said trust deed, and that the Southern Pine Lumber Company claims title to a part of said property. Defendants allege that the Chinns have a complete and

perfect title to lots 17, 18, 19, 20 and 21 in block 60 in Oklahoma City, save as to the cloud existing by reason of the said unreleased deed of trust, and the Southern Pine Lumber Company claims and charges that it has title to all of the property described in said trust deed situate in the city of Guthrie, Oklahoma Territory, which it acquired by purchase. The answer of the defendants then proceeds to state the interests of the various defendants in the said properties (Rec., 46).

Defendants state that the American Exchange Bank brought suit in the District Court of Logan County in a suit numbered 1524, against the various defendants mentioned in plaintiffs' petition, and that judgment was entered in said case on the 2d day of March, 1895; that said property was levied on and sold under said judgment on the 18th day of July, 1895, and they admit that the National Bank of Jefferson and Pentecost, trustee, were never made parties to the said suit.

The defendants do not claim that the sale of the said properties under the said execution in any manner affected the rights of the National Bank of Jefferson, or of Pentecost, trustee, as they then existed, but they charge that subsequently the said note was paid off by the Grigsbys, and that the naked, legal title to said properties remains in Pentecost, as trustee, as against the rights of the defendants.

The defendants then proceed to aver affirmatively that Ward had never been known to any of the parties to these transactions, or to any one else, save the Grigsby Brothers, who held possession after the payment of the note, which, with the trust deed, was delivered to them at that time, and that long after said assignment, and while said Grigsby Brothers were the legal custodians and holders of said paid note and deed of trust, both of which had served their purpose and been satisfied, save upon the record, suit was brought without authority,

under the name of the trustee, as referred to in plaintiff's petition, which said suit, as defendants believe, was brought at the solicitation of the Grigsbys.

Answer and Cross-Bill of the Grigsbys.

The defendants, Grigsbys, for answer to plaintiff's petition, admit, in substance, all the averments thereof (Rec., 56).

They then proceed to reply to the answer and cross-bill of the other defendants to said suit, and in so doing set out in detail all of the transactions and court proceedings leading up to the judgment in what is known as Cause 1524 in the District Court of Logan County, Oklahoma, which said judgment and all of the proceedings therein, they claim to be null and void, and an imposition and fraud upon the court. In other words, the Grigsbys, in substance, aver that the statement contained in the plaintiff's petition to the effect that the claims of all of the other defendants constitute a cloud upon his title, because of the invalidity of the proceedings in Cause 1524 is true, and in effect join with the plaintiff in asking the court to remove what they allege to be the cloud upon their title (Rec., 57 to 69, inclusive, Rec., 71–72).

To the answer and cross-bill of the defendants, Grigsbys, their co-defendants entered a general denial.

Thereafter the cause came on for hearing, and it conclusively appeared that the note for $5,000, sued upon by the plaintiff, Ward, had been paid by the defendants, the Grigsbys, long after its maturity. Part of the record in what is known as Cause 1524 is introduced in evidence, and will be hereinafter referred to. The court below adjudged, as matter of law, that the proceeding known as 1524, in the District Court of Logan County, was an illegality, and no title passed under it to the defendant. It refused to look into the title of Ward, the

plaintiff, because the Grigsbys admitted the note as an existing, valid, outstanding indebtedness, and it could, therefore, it was declared, make no difference to the other defendants whether the foreclosure took place or not, as their title, which was derived through proceedings in Cause 1524 was invalid. Neither the lower court or the Supreme Court found, as a matter of fact, that the note for $5,000 in the hands of the plaintiff was valid and outstanding. The Grigsbys admitted it, and that seemed sufficient from the point of view taken by the court, which was, that, having found the defendants' title bad, and that the Grigsbys, admitting the debt claimed by Ward, it could make no difference to the other defendants and appellees in error whether the plaintiff Ward had or had not a good title.

Assignments of Error.

The court erred:

First. In determining the title of the appellants and plaintiffs in error to be bad, without having first determined the title of the plaintiff to be valid.

Second. In refusing to examine into the validity of plaintiff's title.

Third. In not holding that the plaintiff had no standing as such, and no right to have foreclosure of the deed of trust, or to question the titles of the appellants and plaintiffs in error.

Fourth. In not dismissing the petition and cross-petition for laches in the plaintiff and in the cross-petitioners, the Grigsbys.

Fifth. In not dismissing the petition because the Southern Pine Lumber Company, a Texas corporation, and purchaser at the execution sale in question in this cause, was not made a party, the said Texas company being a necessary party.

Sixth. In not holding that the execution sale in question could not be attacked in this cause.

Seventh. In holding that the said execution sale was void.

ARGUMENT.

I.

Plaintiff's Title.

In substance this suit is a proceeding by a *claimant of land not in possession* against parties *who are in possession and claiming ownership* to declare the title of the plaintiff and oust the defendants from their possession; in other words, it is an equitable ejectment. The defendants deny that the plaintiff has title, and set up their own adverse claims to justify their holding as against him. There were then two issues before the court: 1st. Has the plaintiff title? 2nd. If so, have the defendants, the Southern Pine Lumber Company and the Chinns, or either of them, a title superior to that of the plaintiff?

It would seem perfectly clear that the first question must be examined and answered in the affirmative before the second can be considered in any way, for the defendants, being in possession, are not to be ousted but by a title superior to that possession; that is to say, the plaintiff must recover upon the strength of his own title and not upon the weakness of his adversary's title.

Dick *vs.* Foraker, 155 U. S., 404, 414.

> "Those only who have a clear, legal, and equitable title to land, connected with possession, have any right to claim interference of a court of equity to give them peace or dissipate a cloud on the title."

Orton *vs.* Smith, 18 How., 263.

This fundamental rule the Supreme Court of the Ter-

This fundamental rule the Supreme Court of the Territory of Oklahoma ignored, and because the Grigsbys, through collusion with Ward, admitted his title, *refused to examine it* at the instance of the real defendants, but examined *their* title, and finding it irregular and invalid, eliminated them from the case, reduced it to a proceeding by Ward against Grigsby, and giving partial effect to Grigsby's admission of Ward's rights, rendered a judgment which both of them desired, and which gave them the property, and ousted the contesting defendants (see the judgment of the District Court, Rec., pp. 131 et seq., and of the Supreme Court, Rec., pp. 178–188).

In the judgment of the District Court the only finding as to Ward's debt, is that "from the evidence and the pleadings, *it is admitted* by the defendants, G. M. D. Grigsby and D. J. Grigsby, the cross-petitioners in this action that they are indebted to the plaintiff," etc. (Rec., 132). But certainly the Grigsbys' admission could not affect their co-defendants claiming adversely to them: These co-defendants not only did not admit Ward's right, *but had expressly denied it and challenged him to prove it.* The judgments below ignored this challenge, and refused to look into the proofs; *Ward had no title, and his suit was in collusion with the two Grigsbys and for their benefit, not his*

In his petition Ward asserts that the—

> "sale and assignment of said note and deed of trust was made and completed before the maturity of said note and deed of trust, and was made for a valuable consideration, paid in good faith,"

and that there is due him $11,082.50 (Rec., 33). This statement was admitted by the Grigsbys in their answer (Rec., 56, 57), but it was not true and was explicitly disproved. The note in question was made by the Grigsby Brothers June 11, 1891, and was payable

ninety days after date to the National Bank of Jefferson. This bank became involvent in 1896, and in November, 1898, this note (then over due more than seven years), was in the possession of the banks' receiver, Mr. H. F. Auten, who, on December 8, 1898, by authority of the Comptroller of the Currency, accepted an offer from the Grigsby Brothers, the makers, to pay $2,000, in compromise, and received their check for that sum in payment, and surrendered to them the note and deed of trust (Rec., 81, 82).

Mr. Ward had no part in this transaction (Rec., 84). On December 29, twenty days after the note was paid (Rec., 86), Grigsby's attorney requested the receiver to assign the trust deed in blank, and this he did, it being "a matter of utter indifference to me whether I discharged it or assigned it" (Rec., 85). Before this there was no suggestion of transfer of the securities (Rec., 86).

The testimony of the receiver to the point that the note was paid by the makers is explicit (Rec., 80–89); there is nothing to contradict him; both Ward (Rec., 93, 94) and G. M. D. Grigsby (Rec., 89) confirm his statement. His authority from the Comptroller of the Currency was to accept $2,000 in settlement (Rec., 81). He had no authority to sell the paper.

These two parties, Ward and Grigsby, testify in substance that Grigsby, wishing to take up the note, asked Ward to furnish the money; this Ward *did not do*, he being absent when the note was paid, but upon his return (when this was does not appear) he endorsed a note for $2,000 or $2,500 for G. M. D. Grigsby, who handed him the paid note for $5,000 and the deed of trust as collateral security. The note so endorsed for $2,000 was paid. About a year later Ward endorsed a note of the Grigsby Construction Co. (corporation) and G. M. D. Grigsby for $5,000, which, with $100 unpaid interest, is outstanding

(Rec., 94). *Grigsby Bros., makers of the $5,000 note in suit, owe Mr. Ward nothing*, as he testifies (Rec., 95), *and he had never paid a dollar or a penny on account of his endorsements* at the time he brought his suit, or up to the time of trial. It becomes quite clear from these circumstances, testified by him, that he had no right of action against Grigsby Brothers, who owed him nothing, or against G. M. D. Grigsby, or even the Grigsby Construction Co., *because he had paid nothing for either of them, and might never do so.*

The court will not overlook the fact that Ward in his petition makes no mention of his endorsements for the Grigsbys, and that in the evidence it nowhere appears that any demand has ever been made upon him on account of such endorsements, or that his liability as endorser has ever been fixed in any way. All that is shown is that the endorsed note is overdue (Rec., 94).

We submit as controlling propositions of law:

First. That the plaintiff Ward was bound to establish affirmatively, by legal evidence, his own title, and could not rely upon the weakness of the defendants' title.

> Dick *vs.* Foraker, 155 U. S., 404, 414, and cases cited.
>
> Orton *vs.* Smith, 18 How., 263.

Second. The failure of Ward to prove title, as he alleged, should have defeated his action. He alleged that he bought the note before maturity, and that there was due him thereon, of principal and interest, $11,075 (Rec., 35). He proved that he did not obtain the note until it was seven years overdue, that he paid nothing for it, and that there was nothing due him when he brought his suit, or at the time he testified. Surely the *probata* and the *allegata* should agree.

Third. That the payment by the Grigsby Construction Company of the note of Grigsby Brothers, for $5,000, as shown by the evidence, *discharged the deed of trust*, and it was not revitalized by the subsequent delivery of the paid note to the plaintiff Ward in January, 1899 (Rec., 86, 89), *the defendants being at that time in possession under their execution sale of July 18, 1895*, as appears from the plaintiff's bill, in which the defendants, Southern Pine Lumber Company and others, are charged to be "mere trespassers upon the property" (Rec., 34).

Marvin *vs.* Vedder, 5 Cow., 671.

> "The effect of payment is to extinguish the obligation and everything accessory to it, and to liberate from it all the debtors."
>
> 22 Ency. Am. & Eng. Law, p. 608.

The lien having been discharged by the payment could not have been revived by agreement between the Grigsbys and Auten. The assignee of the satisfied mortgage can have no better equity than his assignor.

De La Vergne *vs.* Evertson, 1 Paige, 182.

And the deed of trust in terms provides that upon payment of the note "this conveyance shall become null and void and of no further force or effect" (Rec., 97).

It can not be claimed that there was an equitable subrogation of Ward to the rights of Auten, the receiver, such as might exist if Ward had advanced to Grigsby the money to take up the note, and Auten had known of it; Ward advanced nothing, and Auten knew only Grigsby, and received Grigsby's money *in payment* (Rec., 84).

In Carter *vs.* Burr, 113 U. S., 537, this court declared the test of payment (extinguishment), under such circumstances as we have here, to be whether the creditor took "the money, *supposing the note was thereby paid and cancelled.*"

"To constitute payment, money or some other valuable thing must be delivered by the debtor to his creditor for the purpose of extinguishing the debt, and the debtor must receive it for the same purpose."

Keystone Bank *vs.* Gay, 21 Barb., 459.
Blake *vs.* New Orleans, 139 U. S., 375 (dis. op.).

If, then, the debt was paid, and the mortgage thereby extinguished, Ward had no standing to sue for foreclosure.

Fourth. If it be held that the deed of trust was revitalized on being handed to Ward to secure his endorsement on the $2,000 note, it expired when that note was paid, and is not alive to secure his endorsement, made a year later, of the $5,000 note now outstanding in the hands of the State National Bank of Fort Worth (Rec., 94).

Fifth. Ward having paid nothing on account of his endorsements, had no cause of action against the Grigsbys, when he filed this suit, and, therefore, must fail. To hold otherwise would be to permit Ward to recover upon the contract to indemnify him against loss before he has suffered loss.

The statutes of Oklahoma exactly define the rights Ward had and disentitle him to his action. They provide as follows:

"Sec. 2948. A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety himself can not pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced.

"Sec. 2949. A surety may compel his principal to perform his obligations when due.

"Sec. 2950. *If a surety satisfies the principal obligation,* or any part thereof, whether with or

without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses. . . .

"Sec. 2951. A surety, *upon satisfying the obligations* of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended. . . ."

"Sec. 2954. A creditor is entitled to the benefit of everything which a surety has received from the debtor in way of security for the performance of the obligation, and may, upon the maturity of the obligation, compel the application of such security to its satisfaction."

And this is the rule elsewhere. A surety must have been damnified before he can foreclose a mortgage security.

Darst *vs.* Bates, 51 Ill., 439.
Stevens *vs.* Hurlbut, 25 Ill. App., 124.

The case cited from 51 Illinois is directly in point. In it the court said:

"A mere surety or person ultimately liable can not sue and recover until he has paid the debt, or in some manner been damnified; nor can he, when secured by a deed of trust, insist upon a foreclosure and the payment of the money to him."

It may be insisted that a surety before payment may have the aid of the courts to apply securities given him for his protection, or to compel his principal to pay, but that is *not the case made by the petition, and no such relief is prayed.* If this were the prayer it is obvious that the bill would be fatally defective for want of a necessary party, the State National Bank of Fort Worth, Texas, holder of the principal note, but no mention of that bank is made in the pleadings.

II.

The Grigsby Cross-Bill.

The Grigsbys having complaisantly admitted the untrue averments of indebtedness found in Ward's petition, supplemented that collusive performance by filing their cross-bill, praying that their title to the land be established subject to the mortgage held by Ward (Rec., 56, et seq.).

Since the cross-bill prays no affirmative relief *against the plaintiff* and is *purely supplementary to the original bill*, it falls with the original bill. The Grigsbys should be remitted to their original proceeding to recover the land. In view of the evident collusion between the plaintiff Ward and the Grigsbys in the filing of the original bill and in their effort to strengthen Ward's hands by means of the cross-bill, they have no right to complain of the application of the rule that the dismissal of the original bill will dismiss the cross-bill.

Ladner *vs.* Ogden, 31 Miss., 344.
Dows *vs.* Chicago, 11 Wall., 108.
Cross *vs.* De Valla, 1 Wall., 5.
Bound *vs.* S. Car. Ry. Co., 47 Fed., 33.

Laches.

But the Grigsbys have disentitled themselves through laches to complain of the execution sale they attack. The sale was on July 18, 1895, and their cross-bill was filed October 29, 1902 (Rec., 56), when for the first time they attacked the judgment. They were then barred by limitations from an original suit (see Act of Limitations, Oklahoma Stat., 1893, p. 765, sec. 3888), having waited more than seven years.

They aver in their cross-bill that they never had *notice* of the pendency of said suit No. 1524 (cross-bill, sec. p. 64). They do not disclaim *knowledge*, and that they

know the technical distinction, is shown by the admission of G. M. D. Grigsby that he did know of the judgment. Being asked when he first learned of the action No. 1524, he answered, "I can not be definite, but some five or six years ago" (Rec., 90). D. J. Grigsby contents himself with saying he learned of the judgment from his brother "several years ago" (Rec., 77).

It is submitted that, being guilty of such laches as their testimony evinces, the Grigsbys should not be permitted to get a standing under cover of the Ward petition (which was filed within five years from the judgment sale), which would be denied them, if their cross-bill were an original.

III.

The Court Erred in Not Dismissing the Petition For Want of a Necessary Party.

The plaintiff named as one of the defendants "The Southern Pine Lumber Company, a corporation organized and existing under the laws of the State of Arkansas" (Rec., 30). The Grigsbys, to support their cross petition took the deposition of T. L. L. Temple (Rec., 107 to 111), and through him showed that from 1889 to 1891 there was a partnership known as Southern Pine Lumber Company, of which Temple was a member. In October, 1891, a corporation under this name, organized under the laws of Arkansas, took over this business. *This corporation went into liquidation in the fall of* 1892, "or sometime during the year 1893" (the year is given both ways), at which time a corporation of the same name, but with different stockholders, was organized under the laws of Texas. The certificate of incorporation of this Texas company was put in evidence by the Grigsbys; it is dated October 18, 1893 (Rec., 114). Temple was president of each of these corporations, but others owned stock in

the Texas corporation to the extent of $25,000 (Rec., 110, 111). The sale under execution in No. 1524 was in July, 1895, two or three years after the Arkansas Corporation was wound up, and the purchaser was the Southern Pine Lumber Company, of Texas. Mr. Temple testifies explicity to this point, saying:

> "The property was sold in Guthrie and Oklahoma City, and was bought in by the Southern Pine Lumber Company, a corporation existing under and by virtue of the laws of Texas, who were the beneficiaries under that judgment" (Rec., 109).

This Texas company was not brought into the suit in any way. *As the purchaser at the execution sale*, it was a necessary party. Without having it before the court, the judgment upon which its claim was and is based, was declared null and void, and its title declared invalid. In his proceeding to quiet title, Ward was bound, at his peril, to bring in all parties in interest, failing which his bill should have been dismissed. If confused between the companies at the bringing of the suit, he might have brought the Texas company in through amendment and by publication.

In Merwin's Equity and Equity Pleading, the rule with respect to parties defendant is clearly stated. He says, sec. 950:

> "The rule as to defendants is, that where a person will be affected directly by the decree, he is an indispensable party, and the court will not entertain the suit without him."
>
> Harrington *vs.* Hubbard, 92 Ill., 569.
>
> "If he is beyond the jurisdiction of the court, and so can not be made a party, the bill must be dismissed."
>
> Shields *vs.* Barrow, 17 How., 130–139.
> Williams *vs.* Bankhead, 19 Wall., 563.

"A party is directly affected by a decree whenever its operation is, (1) to charge him with any liability; (2) to alter or rescind his contract; or, (3) to affect his title or interest in any property."

Section 954:

"Whenever the plaintiff sets up a title to, or interest in, any property which the bill shows is held or claimed by several persons, it is obvious that all the persons thus asserting an adverse claim to the property are necessary parties, because the effect of any decree in favor of the plaintiff would be to transfer the property from them to the plaintiff."

Dow *vs.* Jewell, 18 N. H., 340.

Zelle *vs.* Workingman's Co., 10 Bradw. (Ill.), 335.

Rowell *vs.* Jewett, 69 Me., 293.

The Title of the Defendants (Appellants).

If the execution sale in case No. 1524 can not be attacked in this cause, or if it was only irregular and not void, it must be clear that the judgment below was wrong and must be reversed.

The Grigsby cross-bill enumerates some fourteen or more objections to the proceedings in cause No. 1524, but in the Supreme Court of Oklahoma the objections alleged to appear on the face of the record were reduced to three, namely: (1) That the affidavit to procure publication did not comply with art. 3959 Ok. Code, and show property of the defendants in Oklahoma; (2) that the affidavit did not state that the plaintiff, "with *due diligence*, is unable to make service; and, (3) that it did not show that the $294 sued for in addition to the judgment arose on contract.

The affidavit is very short (Rec., 120), and it is submitted that by fair intendment and through extending

to it the presumptions which attach to every judicial record it contains enough to satisfy the statute. The statute allows service by publication in any case "where the plaintiff with due diligence is unable to make service of summons upon such defendant or defendants within the Territory" (Sec. 3950, Ok. Code), and the record shows that the typewritten affidavit in question contained this statement in substance, but that the words "with due diligence" were found to have a pen-and-ink mark drawn through them when the affidavit was offered in evidence about nine years later (Rec., 120). *No proof was offered to show when the words were lined out or that they were lined out at the time the affidavit was filed and used.* The court, with this affidavit before it, adjudged "that notice by publication has been duly made" (Rec., 124), and, again, that the proceedings had been "duly commenced." From this a presumption arises that the affidavit contained the words "with due diligence," and that they were lined out after the affidavit had been submitted to and passed upon by the court.

It is incredible that the attorney who made the affidavit should have stricken out these essential words. He might, through negligence, have omitted them, but having inserted them he would not strike them out.

The objection that the affidavit does not show that the item of $294 sued for in No. 1524, in addition to the judgment, arose on contract is untenable. The affidavit refers to this item as being due "upon open account." By necessary inference this imports a contract debt. Another answer to all the objections to irregularities or supposed irregularities appears on the face of the papers in No. 1524, which were offered in evidence, is that it nowhere appears *that the entire record in that cause was offered in evidence.* The offers were of the petition (Rec., 117); publication notice and proof of publication

(Rec., 120); the judgment of March 2, 1895 (Rec., 122), the judgment of July 18, 1895 (Rec., 125). There may well have been other affidavits upon which the judgments rested. In the absence of any showing that there were not such other documents, the courts will not overturn the judgment.

Manix *vs.* State, 115 Ind., 245.

The Supreme Court of Oklahoma did not pass upon these objections, but held only that the judgment in No. 1524 was void because, as it found, the action was not authorized by American Exchange Bank (Op. Rec., pp. 187–188). In doing this the court ignored the rule clearly stated in Ency. of Pleading and Practice, vol. 11, p. 1197, that:

> "The complainant must not only excuse his failure to make a legal defense, but also his failure to attack the judgment at law by any method provided by statute which may be applicable. And this is so whether the statutory grounds are legal or equitable in their nature."

The Oklahoma statute (Code, sec. 4464) in terms provides that the district court may vacate or modify its own judgments or orders at *or after* the term at which such judgment or order was made. . . . "*Second.* By a new trial granted in proceedings against defendants constructively summoned as provided in section seventy-two. . . . *Fourth.* For fraud, practiced by the successful party, in obtaining the judgment or order."

The Grigsbys, or Ward, by motion or petition filed in No. 1524, might have procured the judgment therein to be examined and vacated, if found either irregular or fraudulent. That course being open to them, they should not have been heard in this cause on either of the grounds mentioned. Because the record in No. 1524 was yet open for the purposes of direct attack in that

cause, as provided by the statute, this attack should be regarded as collateral and rejected for that reason.

Black on Judgments, sec. 290.

The Supreme Court of Oklahoma, in looking into the questions, ignored their own previous decisions in the case of Hockaday v. Jones, 8 Ok.; 56 Pac., R., 1054, when they laid down the rule as follows :

> "A party against whom a judgment has been rendered by default, which judgment *is void for want of jurisdiction* over the person of the defendant, can not maintain an action to enjoin an execution in said judgment or to annul such judgment unless he makes it appear, both from his pleadings and proof (1) that he has a meritorious defense to the cause of action on which the judgment is based; (2) that he has no adequate remedy at law, and (3), that the existence of such judgment is in no wise attributable to his own negligence."

Not only had the Grigsbys an adequate remedy at law to set aside the judgment if found void or irregular, but they have been permitted here to annul the judgment without payment to Temple or his assigns of that part of the judgment they should equitably pay. They admit in their bill that they were bound for two-thirds of the Texas judgment paid by Temple, on which No. 1524 was based (cross-bill, Rec., 63, 65, 68), and yet there is no payment of the amount into court, and no provision for its payment under the decree vacating the judgment. The court thus ignored the fundamental rule that he who seeks equity must do equity.

It is submitted that the judgment and decree of the lower court should be reversed and the cause remanded.

Respectfully submitted.

ARTHUR A. BIRNEY,
HENRY F. WOODARD,
For Appellants and Plaintiffs in Error.

Office Supreme Court, U. S.
FILED.
OCT 14 1907
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 82.

THE SOUTHERN PINE LUMBER COMPANY ET AL., PLAINTIFFS IN ERROR AND APPELLANTS,

vs.

W. B. WARD ET AL., DEFENDANTS IN ERROR AND APPELLEES.

Brief of Plaintiffs in Error and Appellants in Opposition to Motion of Defendants in Error and Appellees to Dismiss or Affirm.

HENRY F. WOODARD,
ARTHUR A. BIRNEY,
Attorneys for Appellants and Plaintiffs in Error.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

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W. B. WARD ET AL., DEFENDANTS IN ERROR AND APPELLEES.

Brief of Plaintiffs in Error and Appellants in Opposition to Motion of Defendants in Error and Appellees to Dismiss or Affirm.

The defendants in error and appellees move this court to dismiss the appeal, or affirm the judgment of the lower court, and base their right to such action upon the following propositions:

1. (*a*) That the appeal or writ of error was not perfected in accordance with the requirements of rule 9.

(*b*) That the writ of error should be dismissed because the case was in equity, and should therefore be brought up on appeal, and also because not docketed within thirty days.

2. Because the appeal from the trial court to the Supreme Court of the Territory of Oklahoma was not perfected within one year, nor was citation issued to the appellee Ward until after the expiration of one year.

3 (*a*) That the writ of error and appeal was not prosecuted until after the death of G. M. D. Grigsby, one of the appellees; nor was citation issued to the legatee under his will.

(*b*) No proceedings were taken in the court below to revive the judgment.

4. Because the assignments of error are insufficient, uncertain, and defective and raise no question for the consideration of the court.

Answer to Proposition No. 1.

The 9th rule of this court provides:

> "It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of the court, of this court, by or before the return day, whether in vacation or in term time. But for good cause shown the justice or judge who signed the citation, or any justice of this court, may enlarge the time, by or before its expiration, the order of enlargement to be filed with the clerk of the court. *If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed* upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed" (only the material parts of the rule are set out).

The citation in this cause bears date the 12th of June, 1907. The record was filed with the clerk of this

court July 12, 1906, as will appear by the following letter written by the clerk to appellants' counsel at Guthrie, Oklahoma:

OFFICE OF THE CLERK,
SUPREME COURT OF THE UNITED STATES,
WASHINGTON, D. C., *July 12, 1906.*

COTTERAL & HORNOR, Esq.,
Guthrie, Okla.

GENTLEMEN: I have received from Mr. Hegler, clerk of the Supreme Court of Oklahoma, transcript of record in case of The Southern Pine Lumber Company et al., plaintiffs in error and appellants, *vs.* W. B. Ward et al., together with draft in New York for $25 on account of deposit to secure costs in said case, and am informed by him that you are of counsel for plaintiffs in error and appellants, and I write to notify you that the case can not be docketed until an appearance is entered for plaintiffs in error and appellants by counsel, a member of the bar of this court. I enclose an appearance form.

Yours, truly,

JAS. H. MCKENNEY,
Clerk, Supreme Court, U. S., per H. C. M.

It would seem that after defendants in error slept upon their rights for such a length of time, they should not now be heard to complain.

This cause has stood on the docket and been ready for hearing for more than a year, without any intimation on the part of the defendants in error and appellees that it was their intention to move to dismiss for a failure to strictly comply with rule 9.

It must be admitted that the case was not docketed until August 10th, as an appearance for appellants and plaintiffs in error was not entered until that date. At most there was but a technical default and one which we submit should not avail the appellees and defendants in

error because (*a*) of their laches in moving to dismiss; (*b*) because the cause stands on the docket of this court for hearing.

(*a*) The transcript of record was filed July 12, 1906; docketed August 10, 1906; but not printed until May 21, 1907. A period of over nine months.

Examination and inquiry of counsel for appellants and plaintiffs in error has found no case where this court has allowed a dismissal after the case has stood so long for hearing, therefore, so far as the first proposition is concerned it is earnestly contended that the motion should be denied.

As to whether the case should be on appeal or writ of error it is submitted that inasmuch as it was brought up both ways that the court may pass upon that question at the final hearing.

Answer to Proposition No. 2.

The defendants in error and appellees moved to dismiss the appeal and writ of error in the Supreme Court of Oklahoma because the appeal was not perfected within one year, and for other reasons.

We can add little to the opinion of that court on the proposition presented and passed upon and therefore set out herein so much of said opinion as deal with the motion of appellees to dismiss. That court upon a thorough examination of the questions involved refused to dismiss, and sustained its jurisdiction. We submit that this court will not reexamine the motion to dismiss, but will assume that the Supreme Court of the Territory of Oklahoma acted within its jurisdiction.

The opinion is set out from pages 172 to 188 of the record, that part of the opinion which deals with the motion to dismiss in the Supreme Court may be found upon pages 179, 180, and 181, and is as follows:

"The fourth ground of the motion is that summons in

error was not issued within one year from the date of the judgment, to wit: March 16, 1903, and in this connection counsel for the defendants Grigsby and Grigsby move a dismissal of the case because no case made was presented within three days after judgment was rendered, nor was an extension of time granted within three days; that the term of court was allowed to adjourn without time being granted within which to present and settle a case made, and if it be considered that time was allowed, the same was not prepared and settled within the time so allowed.

The judgment was entered on the 16th day of March, 1903, and summons in error was issued March 16, 1904. The record in this case shows that a motion for a new trial was made and filed March 17, 1903, was considered and overruled on April 4, 1903, at which time the appellants excepted to the order overruling the motion, and were allowed sixty days in which to make and serve a case made, and thereafter from time to time up to and including December 22, 1903, for good cause shown, the time was extended 60 days. On the 12th day of October, 1903, however, counsel for defendant in error Ward, acknowledged service of the case made, and on October 15, 1903, counsel for defendants Grigsby and Grigsby, partners, also acknowledged service of the case made on behalf of G. M. D. and D. J. Grigsby, comprising the firm of Grigsby Bros., and each of them. On March 14th the case made was presented to the trial judge for settlement, after due notice to Ward and the Grisbys, and was settled and signed on March 15, 1904.

As to each of the objecting defendants Ward and Grigsbys, the case as shown by the foregoing record was served within the time allowed by the orders of the court extending the time. On the 12th day of September, 1903, the defendants in error, Blincoe, McNeal, Griswold and De Bois, in writing, waived service upon them of the

case made, and notice of signing and settlement of the same, also of the service of the summons in error. October 14, 1903, the American Exchange Bank of St. Louis waived service of case made upon it, which provided that such waiver should not constitute an entry of appearance, and afterwards on the 18th of February, 1904, said bank by its president acknowledged service of the case made. October 16, 1903, Benjamin Whitaker waived service of case made, and notice of the time of settling same. March 5, 1904, the American Exchange Bank waived notice of the time and place of settling and filing the case made.

Under this status of the record we are unable to understand the contention of counsel. The language used with reference to the settling and signing of the case made would seem to indicate that they understood the extension of time granted was an extension of time within which to have the case made settled and signed by the court.

It is argued by counsel for defendants Grigsby that the last extension December 22, 1903, of sixty days, expired February 21, 1904 and case made was not settled until March 14th following, which was too late, as extension of time expired February 21st. The law of proceeding in error by case made is manifestly misunderstood by counsel. The extension of time to make and serve a case made is not an extension of time within which the same may be settled and signed by the court. The case made must be made within three days of the rendition of judgment and served upon the opposing party, unless for good cause such time is extended by order of the court or judge. After service of the case made the same may be settled and signed by the court or judge when presented by either party upon notice to the other within one year of the date of rendition of judgment

The objection therefore that the case was not settled within the time allowed by the court is without foundation.

The objection that no case made was presented within three days, and no extension of time granted within three days, and that the court adjourned without time being granted, presents no substantial ground for the motion to dismiss the appeal. Under the practice in this Territory, the objections and exceptions taken and allowed upon the trial to the proceedings there had, and which are relied upon as error, are preserved by a motion for a new trial, which may be filed within three days after the rendition of judgment, or the return of a verdict, and until after this motion for a new trial is heard and passed upon by the court, there is no reason or grounds for the making and service of a case made. The action is pending in the trial court upon the motion for a new trial, and, may be disposed of upon the application of either party. The verdict or judgment, if one had been entered in the case, does not become final in the court below until such motion for a new trial has been heard and determined, and upon which hearing, if exceptions are taken to the rulings of the court upon the motion for a new trial, the court may then for good cause extend the time within which the case made may be prepared and served by the party objecting, upon the adverse party.

The grounds of the motion that summons in error was not issued within one year from the rendition of judgment, can not be sustained, even though it be granted that such case made must be settled and summons issued thereon within one year of the date of the rendition of judgment. The record shows judgment to have been entered March 16, 1903, and the case made to have been filed in the Supreme Court and summons was issued

thereon as conceded on the 16th day of March, 1904. Sec. 4918, Wil. Ann. Stat., provides:

> "The time within which an act is to be done shall be computed by excluding the first day, and including the last; if the last day be Sunday, it shall be excluded."

This statute was borrowed by this territory from the State of Kansas, where it had been passed upon and construed many times prior to its adoption here. The precise point under consideration here was considered by the Supreme Court of Kansas in Board of County Commissioners of Smith County *vs.* Labor *et al.*, 15 Pac., 577. The court in that case say:

> "A proceeding in error, commenced in the Supreme Court on the same day of the same month of the next year after an order or judgment sought to be reversed, is made or rendered, is commenced within one year, and in proper time."

This objection can not therefore be sustained."

Answer to the Third Proposition.

That the writ of error and appeal was not prosecuted until after the death of G. M. D. Grigsby, nor was citation issued to the devisee under his will.

The citation was issued June 12, 1906. G. M. D. Grigsby died, as is disclosed by the affidavit of his brother, June 30, 1906. The citation was returnable to this court. That so far as the appeal or writ of error was concerned the same was perfected after the allowance of the writ of error June 12th, and therefore the suggestion of the death of the deceased Grigsby was properly made in this court. It is true the record was not docketed until August 10, 1906. It is significant

that on the 15th day of June, three days after the writ of error and appeal was allowed, one F. H. Prendegrast, acting as attorney for G. M. D. Grigsby, accepted service of citation (Rec., 2), and entered his voluntary appearance in said cause. All the parties regarded the cause as being in this court after the allowance of the writ of error and appeal, and it does seem that the motion to dismiss on this ground comes with poor grace, particularly in view of the fact that the appellants were in ignorance of the death of Grigsby until long after the record in this case was filed with the clerk and docketed.

It seems incredible that Prendegrast accepted service of process for the Grigsbys on the 15th day of June, 1906, and thereafter on the 9th day of July, 1907, in his affidavit filed in support of the motion to dismiss, swears "that at the time affiant accepted service of the citation on appeal in this cause, he did so without any authority from the legatee under said will" when the fact appears to be that the deceased Grigsby was living when service was accepted and appearance entered. (See affidavit of Prendegrast, page 11. Motion to dismiss.)

The citation from Bilger *vs.* Waller, 12 Wallace 142—

> "where a party dies before the appeal is allowed and prosecuted the suit should be revived in the subordinate court, and the citation, as a matter of course, should be addressed to the proper party in the record at the time"

sustains the contention of the plaintiffs in error and appellants, because in this case the appeal was allowed June 12, 1906, and Grigsby did not decease until June 30, 1906.

The plaintiffs in error and appellants after the allowance of their appeal and writ of error, and upon ascertaining the death of one of the Grigsbys, suggested his death, and later published for the legatee, which publication and proof thereof was duly returned into this

court, and is now in the possession of the clerk. It is submitted that this ground of dismissal is not only frivolous, but is surrounded by such circumstances as to justify the inference that appellees are not disposed to deal with candor in the matter.

Answer to the Fourth Proposition.

The assignments of error are insufficient, uncertain and defective, and raise no question for the consideration of this court.

It is submitted that the proper time to discuss the various assignments of error is at the hearing on the merits as the defendants in error and appellees may not object to the abandonment of assignments, upon which the appeal was allowed, if in the opinion of counsel they can not be sustained, however, that the court may have an understanding of the appeal and writ of error, a statement of the facts of the case will be set out herein.

One Ward filed his bill in the district court of Logan County, Oklahoma, against the Southern Pine Lumber Company, a partnership, the Southern Pine Lumber Company, a corporation, T. L. L. Temple, G. M. D. Grigsby, D. J. Grigsby and others. The bill was two-fold in its character, and averred that Ward was the bona fide owner and holder, before maturity, of a certain note for $5,000, made by the Grigsbys, which was secured by deed of trust on certain described properties and prayed judgment against the Grigsbys and foreclosure of the mortgage (Rec., 30–35). The latter half of the bill was designed to remove a cloud from the title and averred that the Southern Pine Lumber Compay, a corporation, and others claim to hold some interest in the property included in the trust deed, and then proceeds to attack the proceedings under which the various persons claimed title by challenging the validity of a certain proceeding in an

action at law brought in the district court of Logan County, and prays that the same be declared null and void and that plaintiff's title be quieted.

The defendants, save and except the Grigsbys, answered the bill, and among other things denied that plaintiff was the owner of the $5,000 note, or that it had come into his possession before maturity, and charged that the note sued upon had been paid by the makers, the Grigsbys, and that the plaintiff was not entitled to foreclosure or any other relief.

The defendants, Grigsbys, answered by admitting the note and the ownership of the same by Ward, and they then proceed by cross-petition to assail the validity of the proceeding under which their co-defendants acquired title to the property.

The court below adjudged as matter of law that the proceeding, known as 1524, in the district court of Logan County was a legal nullity and that no title passed under it to the defendants; that the Grigsbys admitted the note as a subsisting valid outstanding indebtedness, and it could therefore make no difference to the other defendants inasmuch as their title was invalid.

It is perfectly apparent from the record that the District court, as well as the Supreme Court, proceeded to determine, first, whether the defendants' title was valid or invalid, and having found it invalid they passed over the question as to whether the plaintiff had a sufficient title to justify his attack upon the title and possession of the defendants. The defendants, save the Grigsbys, were in possession and it will be urged upon the argument of this case upon the merits that it was error for the lower court to have proceeded to the determination of the invalidity of the defendants' possessory right without having first established the title of the plaintiff. Several of the assignments are addressed to this error by the court below.

The lower court did not find, as matter of fact, bu
only by merest inference that the note of $5,000
the hands of the plaintiff was valid and outstandin
The Grigsbys admitted it and that seemed sufficient fro
the point of view taken by the court, which was, havi
found the defendants' title bad, and the Grigsbys a
mitting the note in the hands of Ward, it could make
difference to the other defendants below and appelle
and plaintiffs in error here whether the plaintiff belo
Ward, had or had not a good title. Such a statement
equivalent to saying: Never mind about the plaintiff
title; your's is bad and judgment must be for him. Suc
is not the law. The rule is, both at law and in equity, tha
one who challenges the title or possession of anoth
must first establish title in himself. By the decree
the court the appellants and plaintiffs in error hav
been deprived of their title and possession without an
regard to the proof, which was overwhelmingly to th
effect that the defendant in error, Ward, never did ow
the note, the same having been paid many years previou
to its possession by Ward. In brief, one of the errors
the court below was in destroying the possessory righ
and title of the defendants without first having dete
mined whether the plaintiffs were in a position to attac
their title.

It seems out of place in a motion to dismiss or affir
to discuss the merits of the assignments of error, fo
which reason only so much is gone into here as will en
able the court, upon this motion, to determine, if
deem it necessary, whether the assignments are insuff
cient, uncertain, and defective.

It is respectfully submitted that the motion to di
miss or affirm should be overruled.

HENRY F. WOODARD,
ARTHUR A. BIRNEY,
Attorneys for Appellants and Plaintiffs in Error.

FILED
DEC 9 1907
JAMES H. McKENNEY,

IN THE

Supreme Court of the United States,

OCTOBER TERM 1907.

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vs.

W. B. WARD ET AL., DEFENDANTS IN ERROR AND APPELLEES.

BRIEF FOR DEFENDANTS IN ERROR AND APPELLEES.

JOHN C. MOORE,
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Counsel for Defendants in error and Appellees.

LEADER PRINT, GUTHRIE

IN THE

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BRIEF FOR DEFENDANTS IN ERROR AND APPELLEES.

In presenting the reply brief for the defendants in error and appellees, counsel have agreed to present the several arguments in one brief, as the interests of the defendants in error and appellees are identical, in that a recovery of either will enure to the benefit of the other.

First.

We insist upon our motion to dismiss or affirm for the reasons contained therein; and because the assignment of errors setforth on page seven of the brief of plaintiffs in error and appellants filed in this court, on the merits of the cause, are wholly insufficient to present a question for the determina

tion of this court, in that, said assignment of errors with the exception of the sixth and seventh relate wholly to questions of evidence, and procedure and none of the questions intended to be raised thereby, were ever presented to the lower court for decision, or any excetions taken, whereby any of said questions were reserved for the consideration of this court; and because the assignment of errors setforth in their brief, and urged upon this court, are not the assignment of errors contained in the record upon which the appeal in this cause is based.

The first error assigned in the brief of counsel is, that the lower courts erred in first determining that their title was bad, instead of first determining that the plaintiffs title was good.

As to this question, it appears from the pleadings of the plaintiffs in error that they admit that the trust deed under which plaintiff claimed was valid,, and undischarged, but they plead that the note secured by the trust deed was paid by the Grigsby's the makers thereof, and was never owned or purchased by Ward, so really the question presented is one of the sifficiency of the evidence, and the lower court found against the contentions of the plaintiffs in error (R. 136) viewing the assignment of error from any other standpoint it raises a question of procedure and the plaintiffs in error having plead payment of the note sued upon,

the burden of proof was on them, and they willingly accepted it in the lower court, without objection.

The second assignment of error is just as frivilous as the first, it alleges error in the lower court in refusing to examine into the validity of the plaintiffs title. (R. 136).

The third assignment of error is properly classed with the first and second; the fourth assignment is that the lower courts erred in not dismissing the petition of the plaintiff and likewise the cross-petition of defendants Grigsby because of laches on their part, this assignment may be answered with the statement that neither of the lower courts were ever asked to dismiss either of the actions, and without some action of the lower court, or its refusal to act, there is nothing upon which to predicate error.

The fifth assignment of error is, that the court erred in not dismissing the action because of an alleged defect of parties, the lower court was not asked to dismiss the acton for such reasons, there is no ruling of the lower court upon which to base the alleged error, besides, such questions cannot be raised for the first time upon an appeal. (see authorities cited in motion to dismiss)

The sixth assignmet of error is intended to raise the question whether or not the attack on the alleged title of plaintiffs in error is collatteral, this

question s not before the court because no objecton was ever made to the pleadings in the trial court, for any such reason, infact the question was not presented or reserved in any way.

The seeventh assignment of error may be sufficient to present the question whether or not the judgment under which plaintiffs in error claim is a void judgment.

Second.

We controvert the statement of facts furnished by plaintiffs in error, and especially do we controvert all of that portion of the statement commencing with line twenty-four on page six of their brief to the conclusion of the statement. The facts are as follows:

In the year 1891 D. J. Grigsby and G. M. D. Grigsby borrowed the sum of five thousand dollars from The National Bank of Jefferson, Jefferson Texas, and afterwards in the same year for the purpose of securing the bank they executed and delivered to F. E. Pentecost as trustee, their deed of trust, to the property involvd in this action, to the use and benefit of said bank, and said deed of trust was duly recorded in the proper counties in Oklahoma.

Afterward in the year 1894, and while the obligation to the bank was in full force and effect, the plaintiffs in error the Southern Pine Lumber Com-

pany and T. L. L. Temple who was its president and owner, caused to be filed in the Logan County District Court of Oklahoma, a false, fraudulent and ficitious suit against themselves and the Grigsby's, using the name of the American Exchange Bank of St. Louis Mo., as plaintiff, without its knowledge or consent, sueing upon obligations which had been paid, Temple paying the attorneys and furnishing the costs to sue himself.

Service was procured by publication of notice to the Grigsby's and the property which they had deeded to Pentecost to secure their note given the National Bank of Jefferson Texas, was attached as the property of the Grigsby's. Neither Pentecost or the National Bank of Jefferson Texas was made parties defendant in this action, although the deed of trust was then of record in the several counties in Oklahoma, in the year 1895 the plaintiffs in error took judgment in this action agains the Grigsby's by default, the property was sold under the judgment and was bought by T. L. L. Temple. The Grigsby's did not know of this action and did not appear therein.

Afterwards in the year 1898, the cestui que trust, the National Bank of Jefferson Texas, failed and was placed in the hands of a receiver during that year, and the note and trust deed declared upon in this action were assets of said bank in the

hands of the receiver. After the note was given, and prior to the failure of th bank, the two Grigsby's who were then in the mercantile business in Texas, also failed in business.

After these several transactons, the Grigsby's and others organized the Grigsby Construction Company, a corporation engaged in the construction of railroads. As to just what interest the Grigsby's had in this corporation does not appear, but because of their failure in business they had no individual means with which to take up the note secured by the trust deed in the hands of the receiver of the bank.

W. B. Ward being a man of means and a friend of the Grigsby's knowing their financial condition at the time, and the receiver of the bank at the time pressing them for a settlement of their note, all of the parties having learned of the complicated title to the property deeded to Pentecost to secure the note, and the receiver of the bank evidently not desiring to reply upon a law suit, they naturally attempted, by some means, to satisfy the receiver.

At this junctior Mr. Ward advised the Grigsby's that if their note held by the receiver, could be obtained for a reasonable sum, that he would furnish the money to buy it and take the security, and would attempt to realize upon it through a suit at Guthrie, Oklahoma. Then negotiations

commenced through the receiver with the comptroller of the Currency. The comptroller finally advised the receiver to accept two thousand dollars for the Grigsby note and security, just prior to the time of the decision of the comptroller, Mr. Ward was called to New ork on business, and instructed Mr. Grigsby that in case they should receive a favorable reply from the comptroller during his absence, for him (Grigsby) to draw a check for two thousand dollars of the new corporation of the Grigsby Constretion Company, in payment for the note, and to have the note and trust deed assigned in blank, and that upon his return he would return the money to the corporation, the Grigsby Construction Company, which was done, and the note and trust deed was delivered to Mr. Ward.

The plaintiffs in error claim under the judgment of 1895, being case No. 1524, in the district court of Logan County Oklahoma, in which the plaintiffs in error sued themselves and the Grigsby's using the name of the American Exchange Bank of St. Louis Mo.

Statement of The Pleadings.

The action of W. B. Ward plaintiff below was a suit on a promisory note and to foreclose a trust deed given to secure the note, he made all leinholders and adverse claimates to the property defendants in the action in conformity with tht statutes

of Oklahoma, and the principles of equity. In the second paragraph of his petition he challenged the title of the defendants in error Temple and the Southern Pine Lumber Company; to the form and scope of the petition of W. B. Ward the plaintiffs in error took no exceptions, but willingly came into court and plead that the note sued upon had been paid, and second, set up their title under a judgment of that court rendered in case No. 1524, in the year 1895, avered that their title was regular and valid, prayed that the trust deed of plaintiff be declared void, and that the title to all of said property involved in the action be quieted and confirmed in them.

The defendants Grigsby answered practically admitting the allegations of plaintiffs petition and denying the allegations of the answer of the plaintiffs in error, and by way of cross-petition asking affirmative relief, they attacked the title of plaintiffs in error, prayed that the same be reviewed and adjudged void, and that the title to the property be quieted in them.

Argument.

Whereas, in this case, the assignment of errors present questions which were not presented to the lower court for decision, and were not passed upon by the trial court, or properly reserved, this court will not consider them.

Comstock vs. Eagleton 196 U. S. 99.

This court will not consider assignment of errors which relate to the sufficiency of the evidence to support the general findings of the lower courts.

Zeckendorf vs. Johnson, 123, U. S. 617.

"Errors assigned which relate only to the sufficiency of the evidence to support the findings, cannot be considered here. The findings of fact of the court below are conclusive here, and cannot be re-examined."

Cohn vs. Daley, 174 U. S. 539.

"It must be assumed that the evidence supports the judgment on appeal from a Territorial Court, in which there is no statement of facts in the nature of a special verdict, under the act of congress of April 7, 1874."

Smith vs. Spencer 8 Okla. 459.

Assignment of errors which are not setforth and relied upon in the brief of counsel are considered waived and will not be noticed.

Penny vs. Fellner 6 Okla. 386.

The assignment of errors based upon an alleged defect of parties cannot be considered here, because no such question was ever presented to the lower court.

United States vs. Agee 108 Fed. R. page 10. C. C. A.

Ehret vs. Railroad Co: 151 Pa. 158. (24 Atl. 1068).

Belt vs. Todd, 51 Mich. 21.

Moore vs. Association 45 S. W. 974.

Although the propositions argued by plaintiffs in error in their brief, are not before the court in view of the above decisions, and on account of the condition of the record, yet we will briefly notice them because they contain erronious statements of both law and facts. The first argument under the head of "plantiffs title," to the effect that plaintiff should prove title and possession before he could ask a court equity to remove a cloud from his title has no application to a case like this where the plaintiff sues on a note and to foreclose a deed of trust given to secure the note, it will be admitted that the rule of equity announced in the case cited by counsel when applied to the proper case and state of facts is the rule of equity in most jurisdictions yet it does not obtain in Oklahoma, because by statute a person out of possession holding the legal or equitable title to land may prosecute an action to remove a cloud from his title and to have his title quieted; but is is wholly immaterial what the rule of equity is in such cases for the plaintiff's case doe not fall within the rule.

As to the charge that Ward and the Grigsby's acted in collusion in fameing the issues in this cause and in prosecuting the same, we will say that such is not a fact.

That it has been the experience of almost

every man, that he who is quick to accuse another of infamy, has been intimate with it himself, and we expect to prove in the following pages of this brief the truth of the observation. And yet, even if it were true that they acted in collusion, their acts as shown by this record were wholly directed to the end of securing their lawful rights, and in the scale of morals as between the plaintiffs in error and defendants in error the honors are at least easy.

As to the criticisms of the allegations of plaintiffs petition, the writer of this brief, as the author of that document, will admit that some of the allegations are extravagant, and that, when he drew the petition he did not fully understand his case, because the note and trust deed was forwarded with instructions to file suit with very little information other than that contained in the documents themselves, but these defects are not fatal, no objection was ever made in the lower court on the ground of variance between the pleadings and proof, besides this, under the statutes of Oklahoma pleadings may be amended at any time even after judgment so as to conform to the proof.

The next contention of counsel for the plaintiffs in error, is based solely upon the sufficiency of the evidence to sustain the general finding of the lower court, holding that the transaction between

Ward, Grigsby and the receiver of the Jefferson National Bank, was a sale and assignment of the note and security instead of a settlement and discharge thereof, this question is not before the court.

Zeckendorf vs. Johnson 123, U. S. 617.

However, if Ward and Grigsby understood that the transaction should be a sale and assignment, and so intended, even though the receiver understood it differently, it in law would be a sale and assignment. The receiver of the bank understood it to be a sale and assignment at the time, else, he would not have made the assignment, he was previously advised by Rowell to make the assignment, but we will not go into the evidence upon which the lower court acted. The following cases fully sustain the decision.

Hopkins et al vs. Detwilder etc. 25 W. Va. 734.

Bowman vs. St. Louis Times 87 Mo. 191.

Carter vs. Burr 113, U. S. 741; 28 law. Ed. 1147.

The fact that the indorsement, by the receiver, was made in blank does not effect the sale.

Threadgill vs. Butler, 60 Texas, 599.

The last contention of counsel as against the rights of W .B. Ward, is also based upon the evidence, they, claiming that Ward was merely a

surety for Grigsby, and as such, could not bring a suit on the collatterals held by him, because he had not paid a five thousand dollar note, on which he was surety for Grigsby; it is true that at the time suit was brought, Ward had indorsed for Grigsby in that sum, and that Ward had not paid the note; but in the inception Ward had purchased the note and trust deed by paying to Grigsby the two thousand dollars advanced to purchase the note.

The citations from the Oklahoma statutes concerning sureties, do not apply to the case as presented by counsel, even though the court should feel disposed to review the evidence, and should reach the same conclusion of counsel, although contrary to that of the lower court, because, under the state of facts contended for by counsel, the position of Ward, would be that of pledgee; it would be strickly a contract of pledge; and to hold that the pledgee would have to stand by, and let the note secured by the trust deed become barred by the statutes of limitations, and thereby lose his security, simply because the debt of his principal, had been extended, and was not due and paid, would be an anomly in the law, but such is not the law, it is not only a right, but the duty of a pledgee in such cases to proceed upon the pledge.

Land Title Trust Co: vs. Asphalt Co: 121 Fed. R. 192.

Field vs. Sibley 174 N. Y. 514-66 N. E. 1108.

In concluding our reply to that part of the brief of plaintiffs in error attacking the judgment infavor of defendant in error W. B. Ward, we wish to say, (although it does not appear in the record except indirectly, by the mode of proceedure and the failure of counsel for plaintiffs in error to object to the procedure) that it was at the suggestion of counsel for plaintiffs that the lower court proceeded to try the issues between plaintiffs in error and the Grigsby's before hearing the case of the plaintiff W. B. Ward, counsel for plaintiffs in error stated to the court that if the Grigsbys succeeded, they would lose the property and they did not then care what became of Ward's claims and under this agreement the case proceeded practically as one between the plaintiffs in error and the Grigsby's and it is now too late after consenting to the procedure, and failing to object in the lower court, to urge upon this court that the lower court acted erroniously in the premises.

Second.

As to the attack on the pleadings of Grigsby, we will say that in Oklahoma by statute the distinctions between actions at law and in equity have been abollished, and in lieu thereof, we have only one action for the redress of all wrongs, the form of which and the rules of pleading are regula-

ted by a code of civil procedure, and by the rules of that code the Grigsby's had a right to file what counsel call a "cross-bill".

Oklahoma statutes 1893 sec. 3908. "Any person may be made a defendant who has or claims, an interest in the controversy adverse to the plaintiff, OR who is a necessary party to a complete determination, OR settlement of the question involved therein."

Oklahoma Statutes 1893, sec. 3913.

> "The court may determine any controversy between the parties BEFORE it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them brought in."

As to the allegation that the Southern Pine Lumber Company a Texas corporation bought the property at the sheriff sale and was a necessary party, we say first that if this so, the plaintiffs in error cannot be injured because they have no property involved, and second, they should have raised the question in the lower court and not having done so it is now too late to complain and third that the Southern Pine Lumber Company a corporation under the laws of Arkansas was sued and it answered as follows (R. 43.) "Defendants admit that the Southern Pine Lumber Company, a cor-

poration, was in existence at the time of the acts declared on in plaintiffs petition, and was a legally organised and existng corporaton under the laws of the state of Arkansas." And on page (46) of the record in its answer the defendant coropration alleges that it is the owner of the fee simple title to the property involved, and prays that the title to said property be quieted in it. We certainly have the right party in court.

As to the charge of laches, we pass without notice as the question was not raised in the lower court, in order to raise the statute of limitations, they should have plead them.

The last proposition on page (18) of counsels breif brings us down to the question whether or not the judgment under which plaintiffs in error claim, is a void judgment, and they admit by their statement in italics that if the judgment is void they have no standing in court.

On page (19) of counsels brief, they say in regard to the words "with due diligence" which were sticken out of the affidavit for publication service, that, "no proof was offered to show when the words were lined out or that they were lined out at the time the affidavit was filed and used" this statement we controverd because the original affidavit was before the court, and upon an examination of that document, and the various correc-

tions therein, the signature of the affiant, the pen and ink used, the character of the writing in that and other papers and files in the case conclusively established the fact that they were stricken out before being filed and at the same time was signed and sworn to by the attorney for the plaintiff. The affidavit was signed and sworn to on the 14th. day of November 1894, by plaintiffs attorney, before F. L. McCoy a notary public, and stenographer for plaintiffs attorney, and was not filed in the court until the 17th. day of December 1894. (R. 120) The lower court together with counsel in the case made a careful examination of this question, and we venture the assertion that any one would arrive and the same conclusion.

The general finding of the court includes every thing necessary to be found in order to support the judgment of the court.

Again counsel contend that the court in that case adjudged "that notice by publication has been duly made (124)"

But the recitals in a decree of valid service, are not sufficient to confer jurisdiction in face of the defective affidavit.

See, Newman vs. Crows 60 Fed. R. 220.

As to the suggestion that only one affidavit for service by publication appears in the record, and that there may have been others; we say if

there were others sufficient to support the judgment they would have been introduced by counsel, and it was their duty to so introduce them.

The record in cause No. 1524 was made in the same court in which this case was tried, and the parties thereto are the same as in this case with exception of the plaintiff; the record and files in cause No. 1524 was set out in the pleadings of the plaintiffs in error and the Grigsby's, the proceedings in that cause were involved in this cause, and the trial court could and did take judicial notice of the proceedings in cause No. 1524, and would have found any other affidavit in existence.

Armstrong vs. Colly 47 Vt. 359.

> "A court may properly look into its own docket entries, to see what has been done by it in a case, without requiring proof by the record written out at length, as would be necessary if proof of the proceedings were made in an other court."

Kendall vs. San Juan S. M. Co: 9 Col. 347.

> "The facts left in issue being facts of which the court could take judicial notice, are deemed part of the pleadings, and not matter of evidence."

Dewey vs. St. Albans Trust Co: 12 Atl. R. 224-227.

> "It is claimed that the former adjudication can not be eveiled of here, though set up in the answer, because the record of it has not been put in evidence. But this was

not necessary * * * * the court can properly look into it to see what has been done in the case, without requiring proof in the ordinary way."

Farrar vs. Bates & Co: 55 Texas 193-200.

The Detroit T. & J. R. R. Co: vs. Crane 50 Mich. 182.

"When a party seeks a ruling upon which to base an appeal, if it is wrong, he cannot rely upon the judges private knowledge of facts, but must bring them into the case in some authoritive and responsible form, so that they may become a part of the record for the purposes of review."

It was the duty of plaintiffs in error to bring to this court the record in case No. 1524, if they desire to raise any questions upon the evidence, as to what said record shows. The general finding of a court includes every thing necessary to be found to support its judgment.

Judgment in Cause Number 1524:

The judgment in case 1524 in the district court of Logan County Oklahoma, under which the plaintiffs in error claim to have derived their title is void.

First: because the court acquired no jurisdiction of the defendants Grigsby.

Second: because the court acquired no jurisdiction of the subject matter of the action.

Third: because of imposition and fraud prac-

teed upon the court in procuring said judgment.

If the court in case number 1524, failed to acquire jurisdiction, of the defendants Grigsby, the judgment is void, and if the judgment is void, no defense of collateral attack, laches or any other defense could be successfully interposed, for it has always been the law, that a void judgment may be attacked at any time, in any manner, whenever and wherever it is brought in question, or relied upon in any manner.

Therefore it would make no difference so far as this case is concerned if every theory and argument advanced by counsel for plaintiffs in error was valid, because this court must affirm the judgment of the lower court upon the question that the judgment in said cause is absolutely void, because the affidavit for service by publication, and the affidavit for an attachment, neither state facts sufficient to confer jurrisdiction on the court to render the judgment. The affidavit for service by publication omitting the title of the case and court is as follows. (R. 120.)

> "G. S. Cunningham, being duly sworn, deposes and says that he is the attorney for the plaintiffs in the above entitled cause, who is absent from Oklahoma Territory; that plaintiffs cannot obtain service of summons upon the defendants in this cause, and

this cause is a suit based upon a judgment recovered by the plaintiff against the defendants in the District Court of the County of Dallas, State of Texas on the 9th, day of January, 1892 and for costs and upon an open account.

G. S. CUNNINGHAM.

Subscribed and sworn to before me on this the 14th, day of November 1894.

F. L. McCOY,

Notary Public."

My commission expires July 24th, 1898.

Oklahoma Statutes, 1893, General Section 3950, provides that service by publication may be made in the following cases towit

"Service may be made by publication in either of the following cases: In actions brought under the 46th and 47th sections of this code where any or all of the defendants reside out of the Territory, or where the plaintiff with due diligence is unable to make service of summons upon such defendant or defendants within the Territory;"

((The 46th and 47th sections of the code relate to actions of partition, foreclosure of mortgages and mechanics liens to quiet title and ejectment.))

"In actions brought to establish or set aside a will, where any or all of the defendants reside out of tht Territory; in actions to obtain a divorce where the defendant resides out of the Territory. In action brought

against a non-resident of the Territory, or a foreign corporation, having in this Territory PROPERTY OR DEBTS OWING THEM, SOUGHT TO BE TAKEN BY ANY OF THE PROVISIONAL REMEDIES, OR TO BE APPROPRIATED IN ANY WAY; In actions which relate to, or the subject of which is, real or personal property in this Territory, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a non-resident of the Territory or a foreign corporation; And in all actions where the defendant being a resident of this Territory, has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of a summons, or keep himself concealed therein with like intent."

General section 3951, provides that,—

"Before service can be made by publication, an affidavit must be filed stating that the plaintiff, with due diligence, is unable to make service of summons upon the defendants or defendants to be served by publication, and showing that the case IS ONE OF THOSE MENTIONED IN THE PRECEEDING SECTION. When such affidavit is filed, the party may proceed to make service by publication."

The affidavit for service by publication is fatally defective, and the judgment is void, because the affidavit fails to state that the plaintiff WITH

DUE DILIGENCE is unable to make service of summons on the defendants WITHIN THE TERRITORY OF OKLAHOMA.

Sheilds vs. Miller, 9 Kansas 390.

Braly vs. Seaman, 32 Barb. N. Y. 604.

Harrington vs. Loomis, 10 Minn., 293.

Slocum vs. Slocum, 17 Wis., 155-156.

It will be remembered that the affidavit was sworn to on November 14th, 1894, and was not filed in court until the 17th day of December 1894. (R. 120) and that publication notice was not issued and publshed thereon until the 8th and 10th, days of January, 1895. (R. 121) and the petition in the action was filed December 17th, 1894. (R. 120) This renders the judgment void.

Forbes vs. Hyde, 31 California, 342-351.

Buckley vs. Lowery, 2 Mich., 419.

If the words "with due diligence" were inserted in the affidavit it would still be fatally defective because it fails to show that the defendants are non-residents, or that the plaintiff was unable to make service of summons within the Territory, or that the defendants were concealed or had absconded with intent to defraud, or that the defendants had property or debts owing them within the Territory, which was sought to be taken by attachment, it utterly fails to show that the case is one of those in which service by publication is author-

ized by the laws of the Territory of Oklahoma. The affidavit for the attachment (R. 119.) wholly fails to state that the defendants have property in the Territory subject to the attachment prayed for, and for these reasons the judgment is void.

Harris vs. Clafflin, 36 Kansas 343.
Sheilds vs. Miller, 9 Kansas 390.
Repin vs. McPherson, 2 Kansas 340.
Braly vs. Seaman, 32 Barb. N. Y. 604.
Macburm vs. Smith, 5 Minn. 296.
Roberts vs. Orr, 56 Pa. St. 176.
Harrington vs. Loomis, 10 Minn. 293.
Towsley vs. McDonald, 30 Calif. 611.
Gillispie vs. Thomas, 23 Kansas 138.
Slocum vs. Slocum, 18 Wis. 156.
Rankin vs. Adams, 18 Wis. 308.
Wheeler vs. Curtis, 11 Wend. N. Y. 648.
Akins vs. Akins, 9 Neb. 194.
Cochnower vs. Cochnower, 27 Ind. 253.
Boyle vs. Gordon, 39 Kansas 31.
Drysdale vs. Biloxi C. Co., 6 So. 541.

Our code of civil procedure was taken from Kansas, and with it we adopted the construction placed thereon by the Supreme Court.

Stebbins vs. Guthrie, 4 Kansas, 353.

The court did not acquire jurrisdiction of the subject matter of the action, because the property attached as that of Grigsby's had previously been

deeded by them to F. E Pentecost to secure the National Bank of Jefferson Texas, and the title thereby passed out of the Grigsby's into Pentcost, and neither Pentcost, or the cestui que trust was made parties to the suit or served in any way with process, although Pentecost was a resident of the county in which the suit was brought. The judgment is void because neither Pentecost or the National Bank of Jefferson Texas was made parties to the suit, and because the property was not subject to attachment as that of the Grigsby's; and because Grigsby's did not at the time have any property in Oklahoma subject to attachment.

4 Current Law 686: 8 Current Law 1029.

McCauley vs. Smith, et al, 10 N. Y. Supp. 578.

Gorham vs. Wing, 10 Mich. 486.

Leggett vs. Perkins, 2 N. Y. 297.

Downing vs. Marshall, 23 N. Y. 377.

The judgment is void because of the imposition and fraud practiced upon the court in obtaing the judgment.

Freeman on judgments 2nd. Ed. Sec. 336.

> "Whenever a judgment or decree is procured through the fraud of either of the parties, or by collusion of both, for the purpose of defrauding some third person, he may escape from the injury thus attempted by showing in a collateral proceeding, the

fraud or collusion by which the judgment or decision was obtained."

Buchanan vs. Bilger, 64 Texas 590.

"Fraud vicates and avoids any transaction tainted by it, even the most solemn judgments of a Court of record."

Never perhaps before was such outrageous fraud perpetrated upon any court and persons as was done n this by the plaintiffs in error. T. L. L. Temple and the two Grigsby's had formerly been partners in the lumber business in Texas, doing business under the name of the Union Mills Lumber Company; the company acquired property in Guthrie and Oklahoma City in Oklahoma upon which it had established lumber yards, the property was deeded to the respective partners in proportion to there interests in the partnership; the partnership failed, and was sued in Dallas Texas by the American Exchange Bank of St. Louis Mo., for an indebtedness due the bank, the Grigsby's paid their share of the indebtednsss and assisted Temple in raising his share of the indebtedness, and gave him the money with which to pay the American Exchange Banks claim, Temple did not pay the bank but let the suit go to judgment on January 9th, 1892, and on the 3rd day of February 1892, paid the costs and judgment in full with the money previously furnished him by Grigsby. Thereafter in 1895, Temple took a transcript of

the judgment obtained by the bank at Dallas together with an open account, and instituted a suit thereon at Guthrie Oklahoma, using the name of the American Exchange Bank as plaintiff without its knowledge or consent, sueing hmself and the Grigsby's on obligations that had been paid. Temple paid the attorneys who brought the suit. Temple knew where the Grigsby's lived, could have sued them in Texas if they owed him any money, but instead of sueing them there or even demanding payment of any supposed sum they might owe him, he secretely stole off to Oklahoma and filed suit. Caused the property of the Grigsby's to be their property; and in order to do this he caused the view and purpose of defrauding them out of thtir property; and in order to do this he caused his attorney to commit perjury, in swearing that the bank whose name he used as plaintiff without its knowledge and a claim against the Grigsby's which was just and due and etc.

And when brought into court they admit the fraud, and the defense they make is, that they have a right to plead the judgment thus obtained through their fraud as a source of their title to the property, but the other parties to the action can not resist the judgment because it would be a collateral attack, but this is not the law.

Elliott vs. Pearsoll, 26 U. S. 240.

Wilcox vs. American Tel. & Tel. Co: 68 N. E. 153.

If there ever was a case presented in which a court of equity should annul a judgment it is the case at bar, and in such cases courts of equity always grant relief.

Beaches Modern Equity Practice Vol: 2. sec. 884.

Brewer vs. Bowman 20 Am. Dec. 158.

Ralston vs. Seaman, 51 Fed. R. 707.

Johnson vs. Waters, 111 U. S. 640-667.

The defendants in error respectfully submit, that if their motion to dismiss, is not sustained, that the cause should be affirmed on its merits.

JOHN C. MOORE,

D. W. BUCKNER,

Counsel for Defendants in error and Appellees.

Office Supreme Court, U. S.
FILED.
SEP 13 1907
JAMES H. McKENNEY,
Clerk.

No. 82.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 82.

The Southern Pine Lumber Company, T. L. L. Temple, G. W. R. Chinn, et al,

Plaintiffs in error and appellants,

vs.

W. B. Ward, et al, Defendants in error and appellees.

MOTION BY DEFENDANTS IN ERROR AND APPELLEES TO DISMISS THE APPEAL AND WRIT OF ERROR AND TO AFFIRM THE JUDGMENT OF THE LOWER COURT.

JOHN C. MOORE,
D. W. BUCKNER,
GEO. W. BUCKNER,
Counsel for Defendant in Error.

BAIRD PTG & MFG WORKS, AUSTIN.

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Comes now the defendants in error and appellees, in the above entitled cause, and joining herein for the purpose of this motion, and appearing specially move this Honorable Court to dismiss the writ of error and the appeal allowed in the above entitled cause, and to affirm the judgment of the lower court therein, and for reasons for this motion, they respectfully show to the court:

FIRST STATEMENT.

This is an action by W. B. Ward, to foreclose a trust deed on property situated in the Territory of Oklahoma; and to annul judgments affecting said property, rendered subsequent to the execution and recording of the trust deed, without notice to the trustee or cestui que trust. Answer

and cross bill by defendants in error and appellees Grigsby, to annul judgments affecting the property involved in the action and conveyed by the trust deed, and to have the title to said property quieted and vested in themselves, subject to the trust deed. To these pleadings, the plaintiffs in error and appellants answered the petition of W. B. Ward by plea of payment of the note secured by the trust deed; and answered the cross bill of Grigsby by a general denial.

It appears therefore that this is an equitable action. The judgment of the Supreme Court of the Territory of Oklahoma, affirming the judgment of the trial Court, was rendered on the 7th day of September, 1905, and from this judgment this writ of error and appeal was prosecuted (Transcript of Record, Page 170). this appeal was applied for June 12th, 1906 (Transcript of Record Page 141, and not docketed and filed in this Court until the 10th day of August, 1906 (Transcript of Record Page 200).

The trial of this cause by the Court of first instance was without the intervention of a jury (Transcript of Record Page 130).

Proposition of law under above state of facts, No. 1:

RULE 9 PRACTICE: "In all cases where writs of error or an appeal shall be brought to this Court from any judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause and file the record thereof with the clerk of this Court within the first six days of the term * * *".

Proposition of law under above state of facts, No. 2:

The Act of Congress of April 7th, 1874, concerning practice in Territorial Courts and appeals therefrom, first

supplement to the R. S. U. S., Vol 1, Section 2, Page 7, provides:

"That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decisions of said Territorial Courts in cases of trials by jury, shall be exercised by writ of error, and in all other cases by appeal, according to such rules and regulations as to form and modes of proceedings as the said Supreme Court have prescribed or may hereinafter prescribe."

It appears therefore, that this Court has prescribed the time in which appeals may be perfected and filed, and has limited the time to thirty days from issuance of citation. It appears further that a writ of error will not lie to a Territorial Supreme Court where the case is in equity and is tried in the Court of first instance without the intervention of a jury; therefore the writ of error should be dismissed, because it will not lie under the above Statute and the appeal should be dismissed because not taken and filed in this Court within thirty days from issuance of the citation on appeal.

SECOND STATEMENT.

The final judgment in this cause was rendered and entered in the trial Court on the 10th day of March, 1903. (Transcript of Record, Page 130). The appeal from that judgment to the Supreme Court of the Territory of Oklahoma was filed in the Supreme Court of said Territory on the 10th day of March, 1904, but no citation on said appeal or summons in error was issued out of said Court to the defendant in error therein, W. B. Ward, until after the expiration of one year from the date of the judgment and order over-ruling the motion for a new trial. (Transcript of

Record, Page 166 to 169). The laws of Oklahoma, require the appeal to be taken within one year from the date of the judgment. Oklahoma Statutes 1893, General Section 4452, provides:

"No proceeding for reversing, vacating or modifying judgments or final orders shall be commenced unless within one year after the rendition of the judgment or making of the final order complained of."

These defendants in error and appellees filed motions in said Supreme Court challenging its jurisdiction to review the judgments in this cause, for the reason among others, that the appeal was not taken in time and for want of service of summons on W. B. Ward (Transcript of Record, Page 165 to 170). Thereafter, on the 4th day of June, 1904, long after the year in which to appeal had expired, W. B. Ward filed his motion to dismiss the appeal for the want of service of summons in error on him. The plaintiffs in error thereupon caused a summons in error to issue out of the Supreme Court to the defendant W. B. Ward, and styled it an alias summons (Transcript of Record, Page 168 will be found copy of alias summons).

Thereafter, W. B. Ward filed his motion to quash the alleged alias summons. The Supreme Court of Oklahoma never considered these motions and wrongfully assumed jurisdiction of the appeal. The several motions made in the Court below with the authorities in support thereof, which show a want of jurisdiction in the Supreme Court of Oklahoma to entertain said appeal will be found set out in the Transcript of Record in this Court commencing on page 165 and ending on page 169.

Proposition of law under above state of facts No. 1

Where it is shown that the lower Court had no jurisdiction to proceed in a cause the Appellate Court acquires none.

2 Cent. Digest, App. & Error, Sec. 81.

Pacific Railroad Co., vs. Ketchum, 101 U. S., 289.

Proposition of law under above state of facts, No. 2:

The Supreme Court of Oklahoma had no jurisdiction of the appeal unless the summons in error was issued within one year from the rendition of the judgment appealed from.

Walton vs. Williams, 5 Okla. 642

"A summons in error is not required to be issued within sixty days after the petition in error is filed in this Court. It is required that the appeal shall be taken and perfected, which includes the issuing of summons in error within one year from the rendition of the judgment appealed from."

An alias summons issued more than a year after the rendition of the judgment confers no jurisdiction on the Supreme Court.

Republican Valley R. Co., vs. Sayer, 13 Neb. 280-13 N. W. 404.

"Jurisdiction. Where an alias summons was issued and served after the expiration of a year from the rendition of the judgment held, it gave the Court no jurisdiction."

To the same effect see Baker vs. Sloss, 13 Neb. 230-13 N. W. 212.

Bowen vs. Bowen et al, 30 Ohio St. 312

The Supreme Court under the condition of this Record had no jurisdiction to consider any question in the case.

Wiley vs. Neal, 37 N. W. 920

Elliotts Appellate Prac. Secs. 144-173

The motion of the defendants in error to dismiss the appeal in the Supreme Court of Oklahoma for want of service of summons was confessed by the attempt of plaintiffs in error to procure service by alias summons, see Segar vs. Muskegon S. & L. Co., 45 N. W. 982.

THIRD STATEMENT.

By the decree of the Lower Court an undivided one-half interest in all of the real estate involved in this action was vested in G. M. D. Grigsby deceased, a defendant in error and appellee in this Court (Transcript of Record Page 134) G. M. D. Grigsby deceased, departed this life on the 30th day of June, 1906, leaving a will by which all of his interest in this property was bequeathed to Mrs. Eliza J. Reib a sister; and D. J. Grigsby was made executor of the will (Exhibit "D" hereto attached).

The appeal and proceedings in error in this cause was not taken and prosecuted until after the death of G. M. D. Grigsby, the citation on appeal was dated on the 12th day of June, 1906 (Transcript of Record Page 14). And is returnable in thirty days, the service of the citation was not filed until July 7th 1906 and the record in this court was not filed until August 10, 1906.

The citation on appeal was not directed to the legatee under the will or the executor thereunder (Transcript of Record Page 14).

No proceeding to revive the judgment in this cause as against the executor or legatee under the will was ever instituted in the Supreme Court of Oklahoma, or the District Court of Logan County, Oklahoma; nor was any citation on appeal ever served on them, or service accepted by them

(Exhibits A. B. C. D. hereto attached).

Propositions of law under the above state of facs No. 1:

Oklahoma Statutes, 1893, Sec. 4331, provides:

"If either or both parties die after judgment and before satisfaction thereof, their representatives real or personal, or both, as the case may require, may be made parties to the same in the same manner prescribed for reviving actions before judgment; and such judgment may be rendered, and execution awarded, as might or ought to be given or awarded against the representatives, real or personal, or both, of such deceased party."

Sec. 4325. "An order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successor, unless in one year from the time it could have been first made."

Sec. 4320. "An order to revive an action in the names of the representatives or successors of a plaintiff, may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made."

Sec. 4323. "Upon the death of a defendant in an action wherein the right of any party thereof survives against his personal representatives the revivor shall be against them, and it may also be against the heirs and devicees of the defendant, or both when the right of action or any part thereof survives against them."

Sec. 4324. "Upon the death of a defendant in an action for the recovery of real property only, or which concerns only his right or claim to such property, the action may be revived against his heirs or devicees or both."

Sec. 4318. "The revivor shall be by an order of the Court."

Sec. 4319. "The order may be made on the motion of the adverse parties."

Sec. 4320. "If the order is made by the consent of the parties, the action shall forthwith stand revived; and if not made by consent, notice of the application for such order shall be served in the same manner and returned within the same time as a summons, upon the party adverse to the one making the motion; and if sufficient cause be not shown against the revivor, the order shall be made."

This action has not been revived. The legatee under the will of G. M. D. Grigsby in whom the title to this property was vested at the time of the appeal was not made a party to this judgment or appeal, and her title to the property can not be divested or interfered with. The appeal against a dead man is a nullity.

Kuhnert vs. Conde 30 Kans. 265.

"After a judgment was rendered in the District Court in favor of the plaintiff, he died; and afterwards the defendant for the purpose of reversing the judgment, filed a petition in error and a case in the Supreme Court, purporting to make the former plaintiff, and him only, the defendant in error, more then one year after the judgment was rendered it was revived in the District Court in the names of the representatives and the successors of the plaintiff, held that the proceeding in error in the Supreme Court must be dismissed, for the reason that it was not legally brought to the Supreme Court, and there has at no time been any defendant in error."

The C. B. U. P. R. R. Co. vs. Andrews 34 Kans.

503.

Scroggs vs. Tutt 23 Kans. 181.

Our code of proceedure was adopted from the State of Kansas and with it we adopted the construction placed thereon by the Kansas Courts.

Stebbins vs. Guthrie 4 Kans. 353.

Barker vs. Ladd 3 Sawy. U. S. 442 Fed. Cases No. 990.

Bilger vs. Waller 12 Wallace U. S. 142.

"Where a party dies before the appeal is allowed *and prosecuted* the suit should be revived in the subordinate Court, and the citation as a matter of course should be addressed to the proper party in the Record at that time."

Grigsby vs. Purcell 99 U. S. 505.

"If a transcript is not filed and the cause docketed during the term to which it was made returnable, or some sufficient excuse given for the delay, the writ of error or appeal becomes inoperative, and the cause will be dismissed.

This objection may be taken advantage of by the court upon its own motion, or by the appellee or the defendant in error, at any time before hearing. Mere appearance does not amount to a waiver."

The only steps taken by plaintiffs in error and appellants to make the legatee under the will and the executor parties to the appeal in this Court and parties to the judgment, are under rule 15 of this Court, and Section 1 thereof. Mr. Woodward of Counsel for appellants on April 20th, 1907, suggested the death of G. M. D. Grigsby and prayed for an order under rule 15 compelling said persons to enter their appearance, but neither section of rule 15 has any application to this case, because G. M. D. Grigsby died before

this appeal was perfected. If the Court will notice Section 1 of rule 15, it will find that it provides that: "Whenever pending a writ of error or appeal in this Court either party shall die, etc." That they may be cited to appear, etc., but Mr. Grigsby did not die pending this appeal.

Section 2 of rule 15 provides for abatement upon non-appearance. Section 3 of rule 15 applies solely to appeals from: "Circuit Courts of the United States." And does not apply to appeals from State or Territorial Courts.

This Court can regulate by rule the procedure of reviving judgments in Courts of the United States, and as provided in Section 1 of rule 15, it can regulate the procedure of reviving appeals where a party dies while the appeal is pending and of which the Court has acquired full jurisdiction; but the procedure for reviving judgments in state and Territorial Courts is to be regulated by local Statutes, where the cause for action arises while the cases are pending in the State or Territorial Court. So the proceeding of Mr. Woodward under rule 15 has no force or effect, because Mr. Grigsby did not die pending the appeal, and because this is not an appeal from a Circuit Court of the United States.

If there is any rule of this Court that will govern in this cause, it is rule 50, as follows:

"Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the Clerk's office at any time."

But this rule could only apply in the Court where the suit abated.

The Southern Pine Lumber Co., et al,

Plaintiffs in error and appellants,

vs.

W. B. Ward, et al.—Defendants in error and appellees.

OCTOBER TERM, 1907.

No. 82.

Affidavit of F. H. Prendergast.

United States of America,
State of Texas,
County of Harrison, } ss.

EXHIBIT "A".

F. H. Prendergast, being duly sworn, on oath deposes and says, that he was the sole Attorney of Record for G. M. D. Grigsby, and D. J. Grigsby in the above entitled cause during all of the proceedings had and done in said cause in the District Court of Logan County, Oklahoma Territory, and in the Supreme Court of said Territory. That no notice of any motion, petition, application, writ or other proceeding to revive the judgment in the above cause or this appeal or proceeding in error in said cause, has ever been served on him, nor has he consented that said judgment or appeal or proceeding in error shall be revived. That at the time affiant accepted service of the citation on appeal in this cause, he did so without any authority from the executor under the will of G. M. D. Grigsby deceased, and without any authority from the legatee under said will. That affiant solely acted for G. M. D. Grigsby and D. J. Grigsby in accepting service of said citation, and affiant ac-

cepted said service of said citation, and affiant accepted said service without any knowledge of the death of G. M. D. Grigsby at the time. And has not at any time represented the estate of G. M. D. Grigsby.

F. H. PRENDERGAST.

Subscribed and sworn to before me this 9th day of July, A. D., 1907.

M. McGEE.

(SEAL.)

Notary Public Harrison County, Texas.

The Southern Pine Lumber Co., et al,
Plaintiffs in error and appellants,

vs.

W. B. Ward, et al.—Defendants in error and appellees.

OCTOBER TERM, 1907.

No. 82.

Certificate of Clerk of Supreme Court.

United States of America,
Territory of Oklahoma, } ss.
County of Logan,

EXHIBIT "B".

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that no order of revivor was ever made, nor was any proceedings to revive the above entitled cause, the judgment therein or the appeal or proceedings in error therein ever taken or filed in this Court.

In witness whereof, I have hereunto set my hand and

affixed the official seal of said Court at Guthrie this 28th day of June, A. D., 1907.

BENJ. F. HEGLER,
Clerk Supreme Court of Oklahoma.
By Jessie Pardoa, Deputy.

(SEAL.)

Supreme Court of Oklahoma Territory.

The Southern Pine Lumber Co., et al.
Plaintiffs in error and appellants,

vs.

W. B. Ward, et al.— Defendants in error and appellees.

OCTOBER TERM, 1907.

No. 82.

Certificate of Clerk of Supreme Court.

United States of America,
Territory of Oklahoma, } ss.
County of Logan,

EXHIBIT "C".

I, J. H. Norris, Clerk of the District Court of Logan County, Oklahoma Territory, do hereby certify that no order of revivor or proceedings to revive the judgments in Cause No. 3011, have been filed in this Court.

In witness whereof, I have hereunto set my hand and affixed the official seal of said Court at Guthrie, this 28 day of June, A. D., 1907.

J. H. NORRIS,
Clerk District Court of Logan
County, Oklahoma.

(SEAL.)

District Court.

The Southern Pine Lumber Co., et al.

Plaintiffs in error and appellants.

vs

W. B. Ward, et al.—Defendants in error and appellees.

OCTOBER TERM, 1907.

No. 82.

Affidavit of D. J. Grigsby.

United States of America,
State of Texas, } ss.
County of Dallas,

EXHIBIT "D".

D. J. Grigsby, defendant and appellee in the above entitled cause, on oath deposes and says: that G. M. D. Grigsby one of the defendants and appellees in the above cause, and in whom an undivided one-half interest in the property involved in the above entitled cause was vested by the judgment of the Court from which this appeal is prosecuted to this Court, departed this life on the 30th day of June A. D. One Thousand Nine Hundred and Six. That this deponent is the duly appointed, qualified and acting executor of the estate of said G. M. D. Grigsby deceased. That by the terms of the will of deceased, Mrs. Eliza J. Reib, a sister of deceased, was made his sole legatee. That deponent qualified and received his letters of executorship of said estate on the 4th day of October A. D., One Thousand Nine Hundred and Six. That no notice of any motion, petition, application, writ, or other proceeding to revive the judgment appealed from in the above entitled cause, or to revive the appeal or proceedings in error in the above entitled cause and Court, or in any other Court, has ever been given or served on this deponent, individually or as executor of said estate, nor has any such notice ever been served on Mrs.

Eliza J. Reib, sole legatee of deceased. That deponent has never consented to a revival of said judgment or the appeal or the proceedings in error as against himself individually, or as executor of the estate of G. M. D. Grigsby deceased.

D. J. GRIGSBY.

Subscribed and sworn to before me this 10th day of July A. D., One Thousand Nine Hundred and Seven.

JOSEPH M. DICKSON,
Notary Public in and for Dallas
County Texas.

(SEAL.)

Com. expires June 1, 1909.

FOURTH STATEMENT.

The assignment of errors in this Court are so totally defective, insufficient, indefinate and uncertain as to raise no question for the consideration of this Court.

The assignment of errors are eleven in number, and will be found commencing on page 6 and ending on page 8 of the Transcript of Record in this Court.

All of said assignments of error with the exceptions of the fifth, seventh and eighth raise no questions except questions on the sufficiency of the evidence, nor do any of said assignments of error comply with the rules of this Court regulating the form and substance of assignments of error.

Kelsey vs. Forsyth 21 How. 85.

This Court will not review assignments of error based upon the evidence.

Zeckendorf vs. Johnson 123 U. S. 617.

"Errors assigned which relate only to the sufficiency of the evidence to support the findings, cannot be considered here

The findings of fact of the Court below are conclusive here, and cannot be re-examined."

Loyd vs. McWilliams 137 U. S. 576

Cohn vs. Daley 174 U. S. 539

"It must be assumed that the evidence supports the judgment on appeal from a Territorial Court, in which there is no statement of facts in the nature of a special verdict under the Act of Congress of April 7th, 1874."

Marshall vs. Burtis 172 U. S. 630

Lucas vs. Brooks 18 Wallace 436

Bentes vs. Hampton 123 U. S. 519

If the appellants desire to have any questions based upon the sufficiency of the evidence considered, they should have applied to the Court of first instance to make findings of fact in the nature of a special verdict in order that the several Supreme Courts might review the evidence.

I and O Land Co., vs. Bradbury 132 U. S. 509

Nelsin vs. Wells 104 U. S. 429

Thompson vs. Ferry 180 U. S. 884

Armijo vs. Armijo 181 U. S. 557

The Supreme Court of the Territory of Oklahoma cannot review the sufficiency of the evidence to sustain the judgment below in the absence of a finding of fact.

Smith vs. Spencer, 8 Okla. 459

"The finding of the trial Court upon controverted questions of fact will, on appeal, be given the same effect as a verdict of a jury."

McKennon vs. Pentecost, 8 Okla. 117

"Where an issue of fact is tried by a Court without a jury, and a general finding is made upon such issue by the Court, upon oral testimony, such finding is a finding of

every special thing necessary to be found to sustain the general finding, and, if there be any evidence to sustain such finding, is conclusive upon this Court upon all disputed and doubtful questions of fact."

Waltrie vs. Carriger, 5 Kans. 672

Nicholson vs. Holman, 17 Kans. 22

Evans vs. Layfath, 29 Kans. 739.

The Supreme Court of the United States will not consider any question which cannot be, and was not considered by the lower Court.

Comstock vs. Eagleton, 190 U. S., 99

The seventh assignment of error attempts to raise the question of whether or not the petition of W. B. Ward and the cross-petition of the defendants Grigsby is a collateral attack on the judgment under which the plaintiffs in error claim title. This assignment of error presents no question to this Court because the judgment which they alleged was collaterally attack is an absolutely void judgment, and so found by the lower Court. A void judgment may be attack at any time in any manner, again, any judgment which is plead and relied upon by parties as a basis of their rights may be attacked collaterally. The plaintiffs in error plead and relied upon the judgment which they claim was collaterally attacked; besides this, the question of whether or not the attack of Ward and Grigsby is direct or collateral has never been reserved for the consideration of this Court There is no demurrer, answer or reply, objection or exception in the record raising this question.

Kansas, Pacific Ry. Co., vs. Twomly, 100 U. S 78.

Saline Stock Co., vs. Saline Irrigation CC., 173 U.

S. 109

The fifth assignment of error raises a defect of parties for the first time in the Supreme Court. This question was not raised in the lower Court by any methd, nor was any ruling of the lower Court obtained thereon. Parties cannot raise such questions on appeal or predicate any error upon a proposition not submitted and passed upon by the trial Court

United States vs. Agee, 108 Fed. Rep. Page 10, C. C. A.

"After defendant files plea on the merits and goes to trial, and remains silent until evidence is offered which entitles plaintiff to judgment it is too late to make objections to misjoinder of parties."

Ehret vs. Railroad Co., 151 Pa. 158 (24 Atl. 1068).

"It should have been raised, if at all in liminee, when the petition for appointment of viewers was presented, or at the very latest, when issue was framed by the Court."

Pelt vs. Todd, 51 Mich. 21.

"The question of misjoinder, which is made by defense, we pass without decision. It was not called to the attention of the Court below until the case was brought to hearing on proof, and was then entitled to no favor.

Moore vs. Association, 445 S. W. 974

Rewsieck vs. Cook, 110 Mo. 183-19 S. W. 642.

Pavisith vs. Foster, 67 Wis. 296-30 N. W. 607.

The eighth assignment of error complains that defendants in error should have pursued a different remedy but no demurrer, answer or reply, objection or exception can be found in the record which raises any question upon which to base this assignment of error nor has such assignment of error ever been presented to either of the lower Courts.

Wherefore defendants in error pray that the appeal and writ of error in the above entitled cause be dismissed, and that the judgment of the lower Court in this cause be affirmed.

JOHN C. MOORE,
D. W. BUCKNER,
GEO. W. BUCKNER,
Counsel for Defendant in Error.

Enid, Oklahoma.

SOUTHERN PINE LUMBER COMPANY *v.* WARD.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 82. Submitted December 17, 1907.—Decided January 20, 1908.

Although the record was not docketed until more than thirty days after the appeal was allowed, as it was accomplished soon afterwards and meanwhile no motion was made to docket and dismiss under Rule 9, a motion subsequently made was denied.

Jurisdiction of this court attaches upon allowance of the appeal and proceedings are to be taken here to bring in the representative of an appellee who dies after the acceptance of service of citation.

An appellee, who has not himself appealed, cannot be heard in this court to assail the judgment below.

Nat. Live Stock Bank v. *First Nat. Bank*, 203 U. S. 296, 305, followed, as to when jurisdiction of this court to review judgments of the Supreme Court of the Territory of Oklahoma is by appeal and not by writ of error.

Halsell v. *Renfrow*, 202 U. S. 287, followed, as to when this court, in reviewing a judgment of the Supreme Court of the Territory of Oklahoma, is confined to determining whether that court erred in holding that there was evidence tending to support the findings made by the trial court in a case submitted to it by stipulation, without a jury, and whether such findings sustained the judgment.

In this case this court holds that the Supreme Court of the Territory did not err in finding that there was evidence to support the findings made by the trial court and that those findings sustained the judgment.

THE facts are stated in the opinion.

Mr. Arthur A. Birney and *Mr. Henry F. Woodard* for plaintiffs in error and appellants.

Mr. John C. Moore, *Mr. D. W. Buckner* and *Mr. George W. Buckner*, for defendants in error and appellees.

MR. JUSTICE WHITE delivered the opinion of the court.

Not unmindful that upon this record we are bound by the findings of fact below made and are confined to determining whether the facts as found sustain the judgment, if there is evidence supporting the findings, and, without departing from that rule, we at the outset refer, in chronological order, to some facts which are alleged in the pleadings, which are either directly or by necessary implication established by the findings, and as to which there can be no dispute whatever. We do this in order, if possible, to dispel the obscurity resulting from the prolixity of the pleadings, the unnecessary volume and confusion of the record, and the want of accuracy manifested by some of the assignments of error relied upon.

Prior to June, 1891, two partnerships were located in Texas —one, Grigsby Brothers; the other, the Union Mills Lumber Company, sometimes called the Union Lumber Mills Company. The first (Grigsby Brothers) was composed of G. M. D. Grigsby and D. J. Grigsby; the second (Union Mills Lumber Company) of the two Grigsbys owning four-fifths interest and T. L. L. Temple, one-fifth. At the same time there was located in Arkansas a firm known as the Southern Pine Lumber Company, composed of T. L. L. Temple and Benjamin Whitaker. Prior to June, 1891, D. J. and G. M. D. Grigsby became the recorded owners of the following real estate situated in the city of Oklahoma and in the town of Guthrie, Oklahoma Territory, viz: 1st, an undivided four-fifths interest in five lots in block 60, Oklahoma City; 2d, an undivided four-fifths interest in one lot, in block 54 of the town of Guthrie proper; an undivided four-fifths interest in and to an undivided one-half interest in block 43 in the town of Guthrie, and a like undivided four-fifths interest in a one-half interest in two lots in block 43 and one lot in block 51, East Guthrie. A like one-fifth undivided interest in the same lots was simultaneously acquired and recorded in the name of T. L. L. Temple. In June, 1891, the National Bank of Jefferson, in Jefferson, Texas, discounted

for Grigsby Brothers a note of that firm for $5,000.00. The note was dated June 11, 1891; matured in ninety days; bore twelve per cent interest from maturity, and stipulated for a ten per cent attorney's fee in case of suit to collect. This note was secured by a deed of trust embracing the undivided interest of the Grigsbys in the lots above referred to. E. F. Pentecost, the trustee named in the deed, was empowered, in case of default in payment of the debt to the bank, to sell and apply the proceeds to the payment of the note. This deed was duly recorded in Oklahoma Territory. In August, 1891, the American Exchange Bank of St. Louis discounted for T. L. L. Temple a note of the Union Mills Lumber Company, drawn for it by D. J. Grigsby. This note was for $884.90, payable in ninety days; bore twelve per cent interest from maturity, and contained a ten per cent attorney's fee clause. It was indorsed by T. L. L. Temple individually and by the Southern Pine Lumber Company. This note not having been paid at maturity, the American Exchange Bank of St. Louis, in November, 1891, sued on the note in a state court at Dallas, Texas. The defendants were the two Grigsbys and Temple as partners in the Union Mills Lumber Company, the maker of the note, Temple and Whitaker as partners in the Southern Pine Lumber Company, the indorsers, and Temple individually because of his personal indorsement. Judgment was entered against all the defendants, as members of the two firms and individually, for $1,022.38, the principal, interest, and attorneys' fees. An execution was returned in February, 1892, satisfied "by collecting the full amount of principal and costs and interest of this execution from T. L. L. Temple." In September, 1892, a corporation called the Southern Pine Lumber Company was organized under the laws of Arkansas at Texarkana in that State. T. L. L. Temple was one of the incorporators and subscribed to 997 out of a total of 1,000 shares, and he became the president of the company. In October, 1893, at Texarkana, Texas, a corporation called the Southern Pine Lumber Company was organized under the laws of Texas. Temple was an

incorporator and became its president. In November, 1894, in the District Court for Logan County, Oklahoma Territory, a suit was commenced in the name of the American Exchange Bank of St. Louis against T. L. L. Temple and Benjamin Whitaker as partners in the Southern Pine Lumber Company; the Southern Pine Lumber Company, the Arkansas corporation, D. J. and G. M. D. Grigsby and T. L. L. Temple as partners of the Union Mills Lumber Company. The petition counted upon two causes of action: first, the judgment which had been rendered in the Texas state court at Dallas as if that judgment was still due the bank and had not been satisfied, and second, the sum of $294.56, which was an open account alleged to be due by the Union Mills Lumber Company and the partners thereof, the two Grigsbys and Temple, to the partnership known as the Southern Pine Lumber Company, composed of Temple and Whitaker. This open account, it was alleged, had been transferred by the partnership in 1893 to the Southern Pine Lumber Company, a corporation, which latter, it was averred, had transferred the account to the American Exchange Bank. The defendants, being all non-residents of Oklahoma, were summoned after affidavit by publication and upon affidavit attachments were issued. The undivided interest of the Grigsbys and Temple in the lots in Oklahoma and Guthrie were attached. Ultimately a judgment was rendered in favor of the American Exchange Bank and against the defendants for the amount of the Texas judgment plus the open account sued upon, with interest and costs. The liens of the attachments were recognized, and under execution the interest of the Grigsbys and Temple in the lots in Oklahoma and Guthrie were sold and bought in by "the Southern Pine Lumber Company, a corporation," for a sum less than the judgment debt. In the meanwhile the five thousand dollar note remained unpaid in the hands of the National Bank of Jefferson, the note having been extended from time to time. In 1896 that bank failed, and the note and trust deed were among the assets of the bank in the hands of the receiver appointed by the Comp-

troller of the Currency. In December, 1898, with the approval of the Comptroller, sanctioned by an order of the United States District Court, there was paid the receiver of the bank in settlement of the rights of the bank, $2,000, and the receiver at the time of this payment by a writing assigned and transferred in blank all the right, title and interest of the bank in and to the note and the trust deed securing the payment of the same. The $2,000 was paid by means of a check of a corporation known as the Grigsby Construction Company. With these undisputed facts in hand we now come more immediately to state the case.

This suit was commenced in May, 1900, by a petition filed on behalf of W. B. Ward in the District Court of Logan County, Oklahoma, alleging himself to be the owner of the five thousand dollar note originally held by the National Bank of Jefferson. A decree for the sum of the note, principal, interest and attorney's fees, and for the foreclosure of the trust deed, was prayed. It was alleged that although the note had been renewed from time to time, but was then past due, Pentecost, the trustee, had declined to act, and therefore he was made a defendant. It was, moreover, alleged that certain persons, who were named, asserted title to the property embraced by the trust deed in virtue of an alleged purchase made under an execution issued to enforce a judgment rendered in favor of the American Exchange Bank, and that said claim was a cloud upon the title to the property embraced by the trust deed, which the plaintiff wished to have removed; that all the proceedings in the attachment suit were without effect upon the rights of the holder of the note, because neither the trustee nor the National Bank of Jefferson were made parties to that suit, although the trustee was at the time when the suit was brought a resident of Oklahoma and the trust deed was there duly of record. It was, moreover, alleged that the judgment and sale in the attachment suit were void, because no actual or even constructive notice had been given to the defendants in the suit, and that the purchaser at the sale had knowledge

of the trust deed, of the failure to make the trustee a party and of the absence of notice, actual or constructive, to the defendants in the attachment suit. A judgment was prayed decreeing the proceedings in the attachment suit and the sale made therein to be void and for an enforcement of the trust deed by a sale of the property to which that deed related. The persons made defendants were Pentecost, the trustee; the Southern Pine Lumber Company, a corporation existing under the laws of the State of Arkansas; T. L. L. Temple and Benjamin Whitaker, partners under the name of the Southern Pine Lumber Company; G. M. D. Grigsby and D. J. Grigsby, composing the firm of Grigsby Brothers; G. W. R. Chinn and his wife, and T. L. L. Temple individually, and other persons whom it is unnecessary to name. The defendants, the Southern Pine Lumber Company, T. L. L. Temple, G. W. R. Chinn and his wife, filed a joint answer. The discount of the five thousand dollar note by the National Bank of Jefferson and the execution of the deed of trust securing the same was admitted, but the right of Ward to sue upon the note was denied, it being averred that the note had been extinguished by payment made to the receiver of the National Bank of Jefferson. The proceedings for the sale of the property in the attachment suit were also admitted, and the validity of the purchase made in virtue of the execution issued in that suit was asserted. It was alleged that the answering defendants G. W. R. Chinn and his wife have a complete and perfect title in fee simple to the lots embraced in the trust deed situated in Oklahoma City, and that "the Southern Pine Lumber Company claims and charges that it has perfect title to all the property described in said trust deed situated in the city of Guthrie, Oklahoma Territory, which they acquired by purchase." The answer admitted that although the trust deed was of record at the time of the attachment proceedings, as no notice was given to the trustee or the National Bank of Jefferson, those proceedings did not affect the rights secured by the deed, but that all such rights, if any, had ceased to exist in virtue of the payment

of the note, to secure which the trust deed had been executed. Charging that the trust deed as remaining on the record was a cloud upon their title, the prayer was not only for a dismissal of the petition of the plaintiff, but for affirmative relief in favor of the defendants by decreeing them to be the owners of the property, free from the operation of the trust deed.

The two Grigsbys answered, admitting the execution of the note and trust deed by which it was secured, and that the note was due by them to Ward, the plaintiff, who held the same, as well as the trust deed, by a valid assignment from the National Bank of Jefferson. By way of answer to the affirmative relief prayed by the other defendants, and as a cross-complaint, it was, with great elaboration, alleged that the proceedings in the attachment suit and the sale made thereunder were absolutely void. To support this averment it was charged that the attachment suit was a mere fraudulent scheme devised by Temple for the purpose of defrauding them of their undivided interest in the lots in Oklahoma City and Guthrie; that the judgment sued on in Oklahoma in the name of the American Exchange Bank of St. Louis had long prior to the bringing of the suit been satisfied, and that the suit was brought in the name of the American Exchange Bank without the knowledge of that bank or under its authority, and was therefore actually prosecuted by Temple against himself in order to accomplish the fraud which he had in view. That the alleged open account embraced in the attachment suit had never, in any way, been transferred to the American Exchange Bank, and that that bank had no knowledge of or connection with the account. It was, moreover, alleged that the proceedings in the suit were additionally void, because of the entire absence of legal notice, actual or constructive, to the parties defendant who had interests to protect in that cause. It was averred that the debt represented by the note originally sued on in Texas by the American Exchange Bank was due solely by Temple, and that in satisfying the judgment which had been rendered on the note, he, Temple, had paid his own debt, because the note had

been given in the name of the Union Mills Lumber Company to Temple as a part of the settlement of the partnership affairs, he coming under the obligation to pay the note, but if the note could be treated as a liability of the firm they (the two Grigsbys) would have paid any proportion due by them as partners of the Union Mills Lumber Company, had any notice, actual or constructive, been given them of an alleged claim on the part of Temple against them growing out of the note and the satisfaction by him of the judgment rendered upon the note in the Texas court.

A demurrer was filed by the defendants, the Southern Pine Lumber Company and Chinn and wife, to the cross-complaint of the Grigsbys, on the ground that it showed no right to relief, that it sought collaterally to attack the judgment rendered in the attachment suit, and that the facts alleged disclosed such laches as estopped from recovery. Immediately afterwards a general denial was filed by the same persons without any reservation of the demurrer. The case by stipulation was submitted upon the evidence taken to the court without a jury. The court decided in favor of Ward, the plaintiff, and in favor of the Grigsbys on their cross-complaint. Two formal judgments were entered on the journal, one relating to the claim of Ward and the other to the cross-complaint of the Grigsbys. In the judgment in favor of the plaintiff Ward the journal entry recites: "And the court, after hearing the evidence, finds that all of the allegations contained in the plaintiff's petition, filed herein, are true, and that there is due from defendants G. M. D. Grigsby and D. J. Grigsby to the plaintiff W. B. Ward, on the note and mortgage sued on in this action the sum of fifty-one hundred dollars, and that said note specifies that said indebtedness shall bear interest," etc.

Again: "The court finds that the trust deed sued upon in this action and the note which said deed was given to secure, are each legal and valid as against the defendants G. M. D. Grigsby and D. J. Grigsby; that the plaintiff is entitled to have said deed foreclosed as a mortgage in this action."

Again: "The court further finds that W. B. Ward, the plaintiff in this action, is, at this time, the owner of said note and trust deed."

In considering the proceedings in the attachment suit and the prayer of Ward's petition that the sale under said proceedings be held to be void and the cloud upon his rights created thereby be removed, the court found:

"From the evidence that the judgment in cause number 1524, entitled the American Exchange Bank of St. Louis, Mo., against the Southern Pine Lumber Co. *et al.* defendants, rendered in the District Court of Logan County, Oklahoma Territory, on the 2nd day of March, 1895, and all proceedings or transfers of property under and by virtue of said judgment and cause of action, are each null and void and of no force and effect, and that the purchasers at the sale of the property levied upon, under such judgment, took nothing by their purchase; the court finds that the trust deed sued upon in this action and the note which said deed was given to secure, are each legal and valid as against the defendants G. M. D. Grigsby and D. J. Grigsby, that the plaintiff is entitled to have said deed foreclosed as a mortgage in this action."

And in accordance with these findings a judgment was entered in favor of Ward, the plaintiff, for the amount of the note, principal and interest, directing the sale of the property embraced in the trust deed and the application of the proceeds, first, to the payment of costs; second, to the payment to Ward of the principal and interest of the note and attorney's fees, and the turning over of the residuum, if any, to the Grigsbys as the owners of the property, and barring all rights of the other defendants in the property.

The judgment disposing of the cross-petition of the Grigsbys declared, concerning the debt of Ward, as follows: "The court further finds from the evidence and the pleadings that it is admitted by the defendants G. M. D. Grigsby and D. J. Grigsby, the cross-petitioners in this action, that they are indebted to the plaintiff W. B. Ward by reason of the note and trust

deed . . . and that said debt is a legal and subsisting debt as against the defendants, and is a legal charge upon the property involved in this action." Concerning the attachment proceedings and the sale made thereunder it was expressly found from the evidence that the defendants and cross-complainants, the Grigsbys, had no knowledge of the pendency of the action in time to appear and make defense thereto, that the affidavits for publication and for attachment were wholly insufficient and did not state facts adequate to confer jurisdiction upon the court, that the petition also failed to state facts sufficient to confer jurisdiction, and that all the steps taken in the attachment suit, including the sale, were wholly void and of no effect. Concerning the averments of fraud in the bringing of the attachment suit in the name of the American Exchange Bank the court found as follows:

"The American Exchange Bank of St. Louis, Mo., the plaintiff in said action, never at any time brought said suit, or authorized any one to bring said action in its name, and had no knowledge of the pendency of said action until a long time after the rendition of the judgment therein and the property had been sold thereunder. The court further finds it a fact that the defendants in said action did not owe the plaintiff, the American Exchange Bank, any sum or sums of money; the court further finds as a fact that said action was prosecuted by one of the defendants as against himself and other defendants in the name of the American Exchange Bank, without its knowledge or consent, and for the purpose of defrauding these defendants and cross-petitioners out of their property rights involved in this action, and the court further finds that said action was a fraud and an imposition upon the court as well as on the defendants and cross-petitioners; the court further finds that the Southern Pine Lumber Co., a corporation, and T. L. L. Temple and all other persons purchasing at the sheriff's sale under the judgment in said cause number 1524 above referred to and their grantees, took nothing by their pur-

chase, by reason of said judgment and proceedings had thereunder, being without jurisdiction in the court and absolutely void."

A judgment was entered avoiding the sale made under the attachment proceedings and awarding the Grigsbys the property, subject to the enforcement of the rights of Ward under the deed of trust. After an unsuccessful attempt to obtain a new trial, error was prosecuted to the Supreme Court of the Territory. That court, after elaborately disposing of motions to dismiss, affirmed the judgment. The court held that it was unnecessary to consider the sufficiency of the affidavits for publication and attachment in the attachment suit, as the findings below concerning the fraud in bringing that suit and the absence of a party plaintiff therein sustained the action of the trial court.

"The Southern Pine Lumber Company, a corporation," T. L. L. Temple and G. W. R. Chinn and his wife, appealed and moreover prosecuted a writ of error. Our jurisdiction to review is by appeal (*Natl. Live Stock Bank* v. *First Natl. Bank*, 203 U. S. 296, 305, and cases cited), and therefore we dismiss the writ of error from consideration.

On September 15, 1907, a motion to dismiss was postponed to the merits. The grounds are that the cause was not docketed within the time required by rule of this court, because proper parties were not made in the court below, and because the court below erred in not sustaining a motion to dismiss, and moreover because the assignments of error here relied on are insufficient.

The judgment was rendered on September 7, 1905. On June 12, 1906, the appeal was allowed. While the record was deposited with the clerk of this court within thirty days, it was not docketed until after thirty days, because the counsel who originally forwarded the record were not attorneys of this court, and hence not qualified to enter their appearance. As the docketing was accomplished soon afterwards (August 10, 1906), and no motion to docket and dismiss under Rule 9 was

made, the contention is without merit. *Green* v. *Elbert*, 137 U. S. 615; *Richardson* v. *Green*, 130 U. S. 104.

Service of citation was accepted by all the appellees. The acceptance on behalf of G. M. D. Grigsby and D. J. Grigsby, late partners as Grigsby Brothers and individually, was made on June 15, 1906, by their attorney of record. On June 30, 1906, G. M. D. Grigsby died. In this court the death of G. M. D. Grigsby was suggested and the proper order for publication was made and the return thereof filed. The contention is that the proceedings to make the representatives of G. M. D. Grigsby parties should have been taken in the court below and that hence the notice of publication for that purpose had in this court was ineffective. The answer to the proposition is, that the jurisdiction of this court attached upon the allowance of the appeal. *Evans* v. *State Bank*, 134 U. S. 330, 331, and cases cited. And, although, by a subsequent failure to duly prosecute, the benefits of the appeal might have been lost (*Grigsby* v. *Purcell*, 99 U. S. 505, 508), yet, clearly, as not only had the appeal been allowed, but citation had been issued and acceptance of service thereof been made by the attorney of record of the Grigsbys during the lifetime of both, the appeal was pending in this court at the time of the death of G. M. D. Grigsby, and as the case had been docketed proceedings were rightfully taken here to make his representative a party.

The remaining grounds, viz., the failure of the court below to dismiss and the inadequacy of the assignments of error, involve no question concerning our jurisdiction. In order, however, to at once dispose of the first contention we observe that the appellees cannot be heard to assail the judgment below, since they did not appeal. *Field* v. *Barber Asphalt Paving Co.*, 194 U. S. 618, 621, and cases cited.

We come to the merits. Before doing so it is necessary to fix accurately the scope of our inquiry. The case was submitted to the trial court by stipulation without a jury. That court by virtue of the Code of Civil Procedure of Oklahoma was empowered to make findings of fact as the basis of its

conclusions of law. Rev. Stat. of 1903 (4477), § 279. On the writ of error which was prosecuted to the Supreme Court of the Territory that court was confined to determining whether the findings of the court below sustained the judgment if there was evidence supporting the findings and was not at liberty to consider the mere weight of the evidence upon which the findings were made by the trial court. Under these circumstances, notwithstanding the ruling in *Natl. Live Stock Bank* v. *First Natl. Bank*, *supra*, pointing out the difference between the method of reviewing a case coming from the Territory of Oklahoma and cases coming from the Territories generally, our review in the case before us is confined to determining whether the court below erred; that is, whether that court was mistaken in holding that there was evidence tending to support the findings and that such findings sustained the judgment. *Halsell* v. *Renfrow*, 202 U. S. 287.

1st. It is contended that the court below erred because it did not find, as a matter of fact, that the debt was due Ward, but contented itself, as did the trial court, with assuming the debt to be due, merely as a result of a collusive admission made by the Grigsbys to that effect in their answer, thus depriving the defendants of the property acquired by them in the attachment proceedings because of the weakness of their title, and not on account of the establishment of an adverse right in Ward. It being, moreover, insisted that as the failure to find affirmatively in favor of Ward's debt, irrespective of the admission made by the Grigsbys, required the rejection of Ward's demand, a like result was necessary as to the cross-petition of the Grigsbys, since that petition was purely ancillary to the original demand of Ward for relief, and therefore should have shared a like fate.

It is apparent that these contentions rest upon the proposition that no finding was made by the court below concerning the existence of the debt of Ward. The proposition is thus stated in the brief of counsel:

"In the judgment of the District Court the only finding as

to Ward's debt is that 'from the evidence and the pleadings it is admitted by the defendants G. M. D. Grigsby and D. J. Grigsby, the cross-petitioners in this action, that they are indebted to the plaintiff,' " etc.

The words thus quoted are taken from the findings and judgment of the trial court disposing of the cross-petition of the Grigsbys, but these words immediately follow the passage relied on:

"By reason of the note and trust deed sued on by the plaintiff in this action in the sum of five thousand seven hundred and ninety-seven dollars ($5,797.00) and that said debt is a legal and subsisting debt as against the defendants and is a legal charge upon the property involved in this action."

But putting this out of view, the inaccuracy of the statement that the passage referred to is "the only finding as to Ward's debt," is patent on the face of the record. We say this because the statement overlooks the explicit findings which the trial court made, as to the proof of Ward's debt, in the judgment which was entered concerning that debt which we have previously quoted. In so far as the proposition assails the sufficiency of the evidence to sustain the express findings concerning the debt of Ward, it suffices to say that we think it is beyond question that there was testimony tending to show that the note and trust deed originally held by the National Bank of Jefferson had been acquired by Ward for a valuable consideration. Indeed, that the proposition now relied upon is a mere afterthought is demonstrated by the application for a new trial made in the trial court, since such application, among others, was expressly based upon the ground that the court had erred in finding that Ward's debt had been established. And the same is substantially true of the assignments of error made for the purposes of the writ of error to the Supreme Court of the Territory. In other words, having asserted below that error was committed because the trial court had found that Ward's debt was established by the proof, it is now insisted that the court erred because no such finding was made.

While if there had been no evidence tending to sustain the claim of Ward other than the admission of the Grigsbys, such admission might not have been adequate as tending to sustain a finding in favor of Ward, clearly such admission, considered in connection with the findings below concerning the proof of the debt of Ward, is sufficient to answer the argument that relief should not have been given Ward, because the note upon which he sued was held by him as collateral security. We say this because as the note indorsed by Ward to secure his freedom from liability upon which the collateral was held by him was outstanding and past due, the right of Ward to enforce the collateral was a matter solely between himself and the Grigsbys with which the purchasers at the attachment sale were not concerned, as they had failed in establishing their plea that the collateral held by Ward had been extinguished by payment.

2d. It is insisted that the court below erred in not dismissing the action on the ground of the laches of the Grigsbys in assailing the proceedings in the attachment suit. This objection can have no relation to the claim of Ward, since the findings below exclude the conception that Ward's debt was barred by limitation, and, indeed, the case was tried upon the admission of all the defendants that the debt of Ward was due at the time of the bringing of the attachment proceedings, and upon the assertion of Temple, and those who answered with him, that that debt had been, subsequent to the attachment proceedings, extinguished by payment. True, it is, that laches on the part of the Grigsbys was made one of the grounds of the demurrer filed to their cross-petition, but the answer contained no reservation of the demurrer and the findings of the trial court, as well as the action thereon of the Supreme Court of the Territory, negate the conception that the courts below could have been of the opinion that facts sufficient to show laches had been established. Besides, the contention as to laches disregards the considerations which in the nature of things must arise, when it is borne in mind that the defendants,

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who claimed title under the attachment proceedings, did not rest content with defending their alleged title, but made that title the basis of an assertion of a right to affirmative relief, since they substantially, by cross-petition, invoked such relief to maintain the validity of their title, and to obtain a cancellation of the trust deed upon which Ward relied.

3d. It is urged that the court below erred in passing upon the validity of the attachment proceedings, because there was an absence of a party whose presence was essential to a decision of that question. This is based upon the assertion that T. L. L. Temple, who testified that he was president of both the Southern Pine Lumber Company, the Arkansas corporation, and of the Texas corporation of the same name, also testified that the Arkansas corporation went into liquidation in 1893, and that the Texas corporation was the purchaser at the attachment sale, and was therefore the owner of the property involved in the suit. It is insisted that as there was no evidence tending to dispute this testimony, there was nothing justifying the conclusion that the Arkansas corporation had an interest in the property, or had the capacity to stand in judgment concerning the validity of the sale in the attachment proceedings and the title to the property held thereunder. We think the proposition is without merit. Ward, by his petition, made the Southern Pine Lumber Company, a corporation organized and existing under the laws of Arkansas, Temple and others, defendants, and did not refer to a Texas corporation, known as the Southern Pine Lumber Company, as having any rights whatever in the property. The answer filed on behalf of Temple and the Southern Pine Lumber Company, the Arkansas corporation, expressly asserted that that corporation owned the property and, in effect, implied that it was the purchaser at the attachment sale. And the same thing is, in effect, substantially true with reference to the cross-petition of the Grigsbys. As then, on the record, Temple was a party to the pleading, which expressly asserted title in the Arkansas corporation, and the whole controversy proceeded upon the truth

of that assertion, we cannot say that there was nothing justifying the trial court in treating the Arkansas corporation as the purchaser at the attachment sale and as the owner of the property, even if to reach that result the trial court may have been of the opinion that the testimony of Temple on the subject was not worthy of credit. And additional force to this view results from a consideration of the proceedings intervening subsequent to the findings and judgment of the trial court and the final judgment of the Supreme Court of the Territory. We say this because both the motion for a new trial made in the trial court on behalf of Temple and the Southern Pine Lumber Company of Arkansas and the assignments of error on behalf of the same parties, which were made for the purposes of the writ of error from the Supreme Court of the Territory, made no reference to the purchase and ownership by the Texas corporation, but in effect asserted the purchase and ownership by the Arkansas corporation. The first assertion upon the record outside of the testimony of Temple of any right on the part of the Texas corporation made its appearance in a motion for a rehearing, filed after the Supreme Court of the Territory had decided the case, and which was reiterated in the assignments of error filed on the appeal to this court. The right of the appellees to the judgment in their favor may not now be destroyed by a suggestion as to want of parties, made by the appellants after final judgment, when that suggestion conflicts with the issues as made up and upon which the case was tried, and which, if the suggestion be correct, would involve reversing the judgment at the request of the appellants because of deceit practiced by them upon the territorial courts. Because we dispose of the contention upon the reasons just stated, we must not be understood as deciding that, in view of the relations of Temple to the Texas corporation, as testified to by him, and the other circumstances disclosed by the findings below, it may not be that the judgment below was conclusive upon the Texas corporation, if it had title, although it was not technically a party to the record.

Into a consideration of that subject we do not deem it necessary to enter.

4th. It is insisted that error was committed by the trial court in its finding concerning the jurisdictional insufficiency of the affidavits for publication and attachment in the attachment suit. But the grounds upon which this is based simply go to the weight of the evidence concerning the findings made by the court on those subjects, and that is not open. Further, as we are clearly of the opinion that the conclusion of the Supreme Court of the Territory, based on the findings below, as to the fraud in bringing the attachment suit and the absence of a party plaintiff therein, are ample to sustain the judgment, irrespective of the affidavits for publication and attachment, the claim must be held to be without merit. It is, moreover, urged that the courts below erred in holding the sale void as to the Grigsbys, and in recognizing their equity in the property without condemning them to pay their proportion, as partners in the Union Mill Lumber Company, of the debt which was sued on in the attachment proceedings and in not taking into consideration improvements which it is asserted were put upon the property by the purchaser at the attachment sale. The first of these is placed in argument upon the ground that the cross-petition of the Grigsbys admitted that the debt sued on in the attachment suit was, as between them and Temple, a partnership debt, for which they were jointly liable with Temple. But this statement, as made in argument, is rested solely upon a partial consideration of the Grigsby cross-petition, and ignores the express allegation to the contrary which that petition contained. It suffices to say, however, as to both of these contentions that there is nothing in the record disclosing that they were directly or indirectly presented to the trial court by way of pleading or otherwise before final judgment, and indeed were not made the subject of complaint in the motion for a new trial, and were evidently regarded by the Supreme Court of the Territory as an afterthought and not open under the state of the record.

Affirmed.

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CASE